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By HUGH FARRELL,
Financial Editor, New York Commercial

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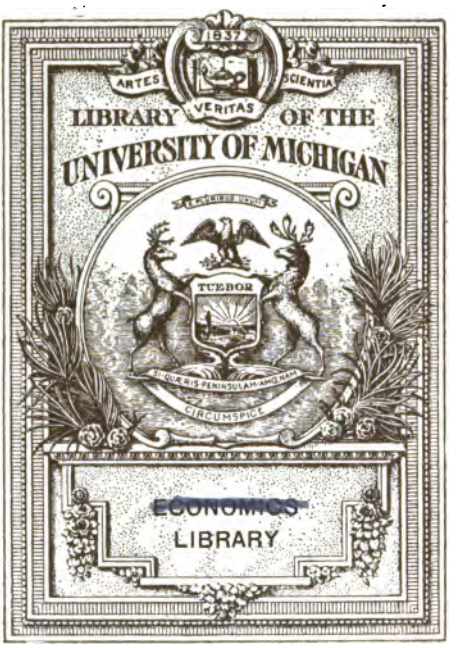
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Introduction.

Archaic laws and restrictive regulations threaten the free develop-nent of the economic processes which are moving towards improvement of the general welfare. These processes function in accordance with their own laws—they cannot flourish under artificial conditions. Political control of economic law is to be resisted on the ground that the course of economic development cannot be foreseen, is constantly changing direction in a manner which defies the efforts of the most flexible political laws and regulations to conform with it. The truth of this statement has been proved by experience and experiment

Political laws, however, seldom are drawn with a view to conforming with the changing course of economic development. On the contrary, the effort is usually towards forcing economic development to conform with political laws and regulations. The efforts in this direction have had their effects, but they have not been the effects sought by those responsible for the enactment of the laws. It is well known that these laws have been futile so far as their intent was concerned, but they have nevertheless operated to change the course of economic development, and it is undeniable that the waste incident to constant economic adaptation to political laws has been borne by the masses of the people in the shape of a deferment of the increase in productive equipment upon which the maximum good derivable from the industrial system depends.

The decision of the Supreme Court in the Hardwood case throws up a new obstruction on a new road—that taken by the co-operative movement as expressed in the form of trade associations. The "trust" movement, against which the Sherman Law was directed, has lost momentum largely as a result of internal modifications, the growth in that direction having been stopped at the limit set by the law of maturity. The co-operative movement expressed in trade associations is in its infancy—is a quite unforseen development of our industrial system. Mr. Farrell's plea for an era of "Self Government In Industry" is predicated upon a belief that our economy is about to develop a new form of industrial co-operation which will harmonize very closely with our political institutions. His discussion of the situation created by the Hardwood decision, which was published in serial form in the New York Commercial under the general title, "Why the Sherman Law Should Be Repealed," has aroused nation-wide interest among those interested in fundamental questions, and has

already resulted in various spontaneous steps toward reform, and also in increased and better informed discussion in the popular press. The boldness of his attack upon the Sherman Law effectively destroyed the notion that a bad law can be sanctified. His conclusions, however, do not call for a repeal of the law, but for its modification.

In its original form, Mr. Farrell's discussion was necessarily limited by his efforts to adapt the discussion to current developments. As now presented, in revised and rearranged form, the discussion is developed in a more orderly manner, but it nevertheless retains evidences of its original form, which could not have been eliminated except at the cost of a complete rewriting. In view of an immediate demand for publication of the complete discussion a rewriting is impracticable, and the result is herewith presented in full confidence that it will serve its purpose, and that is as a contribution to the solution of our fundamental problem of arriving at mutual understandings of one another's aims and intentions in relation to the general welfare.

RUSSELL R. WHITMAN,
President, New York Commercial.

New York, June 1, 1922.

Law Must Follow Economic Trend

In his "Reconstruction of Economic Theory," published by the American Academy of Political and Social Science in 1912, Dr. Simon N. Patten, professor of political economy at the University of Pennsylvania, said:

"Each age is ruled either by the judgments of the past ages expressed in sentiments, traditions and law or it judges its own acts, expresses its own will and avoids the evils it sees instead of those its predecessors assumed would exist. The rules of a stable advancing civilization are concurrent estimates of present welfare and not predetermined judgment based on ancestral anticipations. The change from one basis to the other is not a sudden revolution but the gradual result of awakened public opinions."

Here in two sentences Dr. Patten puts the pragmatic doctrine of "natural development" which is accepted by leading scientists in all fields of research throughout the world into contrast with dogma in a way that leaves little choice for men of common sense. In the third sentence quoted, Dr. Patten indicates the processes which result in change.

Perhaps no similar period in history has seen as many new economic growths as the 30 years which have passed since the Sherman law was enacted. During most of that period these growths were necessarily in their primary stages; it has been the last few years that have seen them flower and take definite form. Yet learned publicists say that everything worth knowin about the relation of the Sherman law to economic development has been put into 80 volumes of public prints, which have been stored in the cellars of the public buildings at Washington for 20 years.

The investigations of which these reports are the record were mostly made somewhere around 1900. There have been other investigations mainly of an ex-parte character since that time, but these did not pretend to the dignity of impartial inquiries into the merits of the situation; they were merely intended to and in fact were used to further impress the public with the zeal and vigilance of public officials in guarding the people against the nefarious schemes of the "interests." These reports were colored by the radical political sentiments of the individuals who compiled them, and were the results of perverted sentiments and emotions which gave no consideration at all to the question of the possible value of the things attacked.

As for, the more elaborate and thorough investigation made in 1902 by the Industrial Commission that was directed at the abuses of "stock promoters" in connection with the organization of new trusts and at the operations of the "pools" and combines, developed in the first hectic days of the novement toward consolidation and cooperation. This investigation resulted in the enactment of some of the most important regulatory laws on the statute books, and in a proper condemnation of the practices which were then common among business men and organizations. The disclosures in connection with this investigation formed the basis of the prejudices which have ever since had a place in the minds of legislators and some others who give thought to public affairs. They are the basis of the timidity which characterizes business men today in the operation of co-operative plans that are as far removed from the primary forms of business organization as the flower is from the seed.

Critics do not credit the statements that these old forms of combinations were self-destroying, or claims that they would have disappeared even if they had been allowed all the latitude they wanted. These statements are nevertheless true and are not controverted by the fact that "pools" and "combines" of the worst form are being operated today in some localities and industries. Ignorance, a want of fore sight and intelligent self-interest led to the development of "pools" in the first place, and are responsible for their existence today—that and the law which prevents open organizations in which reforms could be carried out by those who have vision and a sense of responsibility to the public.

In the main, the trades which operate the "pool" system today are controlled by foreigners whose attitude toward this country is that of plunderers. Mr. Samuel Untermyer, a leading critic of "trade co-operation," has been in contact with some of these and it is doubtless because of his peculiar and innate knowledge of the essentially anti-social attitude of these types toward the people of this country that he is led to express alarm lest the institution which he apparently cherishes as much as any of us, be destroyed.

Among enligtened trades and producers, the old vicious form of "pool" has disappeared, or survives only in a greatly modified form. Its disappearance or modification was manly due to the foundation of immorality upon which it rested; honesty among thieves is a

rare virtue, and this form of co-operation in banditry disappeared largely because the co-operators found that they could not trust one another. The new form of co-operation is based on a higher appreciation of the self-interest value of the intelligent use of economic statistics, if not as yet upon a higher conception of the social obligations of those who manage industry.

The question of the value of trade associations to the economy and social organization of this country has never had the consideration at the hands of the lawmakers that the importance they have attained demands. Trade associations in their present form are not mentioned in any economic treaties of general scope published prior to 1910. As a matter of fact these associations are mainly a development from the enforced co-operation put in effect by governmental authority during the war. Some forms of trade association were in operation before the war, and the "open-price" associations have been under fire off and on for a number of years. But the great majority of the associations now in operation were not in being prior to 1917.

The appearance of trade associations of the modern type is regarded by some economists as signalizing the opening of a new era in industrial development. Up to the time of their appearance, it was believed that the inevitable course of industrial organization was toward the final form of the trust. Some economists are now beginning to modify that view, and are looking with new interest upon the possibilities of industrial organization development along the lines of co-operation among numerous small businesses. Instead of a development into an economy dominated by large aggregations of capital under centralized control, they see the possibilities of the preservation of the small business unit. The superiority of the small business unit was claimed even before the possibility of its survival was even dreamed of.

These are the developments of yesterday. They could not have been considered in an inquiry that was conducted in 1902, or in 1914, or at even any time prior to this very year. Tendencies have been in evidence for a long time, that is since the war, but no worth-while consideration of the significance of these associations could have been had prior to the development of the economic and legal situaion which confronts us today. Even if the essential question of "public policy," in connection with trade co-operation has been settled to the satisfaction of the courts and lawmakers of the country, there is sufficient reason for a reconsideration of the up-to-dateness of that policy, which goes beyond the mere unwisdom of any attempt to control economic law by statute law, or rules of policy. As we view it, this concept of public policy is founded not so much on a desire to seize and "freeze" a transitory condition described as the "competitive system," as upon a fear that the Government and public would be powerless to control powerful groups once they were set going. That fear arose in the days before the development of "statistics." Today we know or can know every detail of industrial operation, and through statistics we have an absolute and perfect check upon abuses in any form. The relation of statistical research to economic control has never been considered by a legislative body.

New developments which call for a reconsideration of old ideas confront us.

II

Existing System of Production Analyzed

What is the present and potential value of the industrial system, as we know it, to the average man? Is it in fact a system of exploitation or is it a system which on the whole operates to the benefit of most of the people most of the time? If it is merely a system of exploitation, there is nothing more to be said. The best we can do in that case is to throw all possible restrictions around those who run it, and sit back and hope for the best.

What are the material ends we are seeking? Why, a maximum of comfort for a minimum of effort. When the pioneer goes into the virgin wilds he first builds a cabin for the immediate protection of himself and family, and if he is a wise pioneer he builds it to be as comfortable and enduring as he knows how to make it. From the cabin he moves into a house, and from the house, if he retains his ambition to go on, he moves into a mansion.

Our pioneer could stop his material development at any stage at which he was so minded, but if he should quit anywhere short of his goal of maximum comfort for minimum effort we'd call him a failure, because if he stopped before he reached his goal he would have to go on being a drudge to his family needs, live his entire life in surroundings far short of what he could attain through effort, and thereby fail to measure up to our idea of a man. Our own stages of progress parallel those of the pioneer. We have moved out of the cabin into the house and are, perhaps, on our way to the mansion.

As a practical matter we know that all men now living cannot attain the ideal maximum of comfort for a minimum of effort; most of us are, perhaps, destined to get a minimum of comfort for a maximum of effort, but that cannot now be helped. It might have been helped to some extent if we had had sense to allow the industrial system to develop naturally and had not hampered it at every step during the last 30 years; but there is no sense in crying over spilt milk.

Next to his own welfare, the average man is interested in the welfare of his children. After we pass a certain age we all begin to think about our children's futures. At present we try to lay aside a little something with a view to relieving them of the hardships through which we have passed. Most of us are interested in the welfare of the coming generation. The next generation, our children, will be interested in the generation that is to follow, and so on until the end.

We, therefore, want a maximum of comfort for a minimum of effort for ourselves, if we can get it, and if we cannot attain the ideal ourselves—and we can't—we aspire to the ideal for our children.

Which brings us up to consideration of the existing economic order as a means to our end. In order to get at an understanding of material progress, we must forget about rich and poor, and think about it in terms of the tools of production and national wealth. The first cave man who cracked a nut with a stone opened the era of progress, for he made the stone a tool, and man's material progress since that time has been measured mainly by the development and discovery of new tools, new methods of transportation and communication, new methods for the interchange of knowledge and an increasing vision of his future. Any age or day which shows an increase or improvement in any of these things over the preceding age or day, therefore, has the right to claim that it is progressive.

We all know that the system under which we live has added and is adding to the instruments of progress, but we are not all aware of the value and importance of this process to the general welfare. Our system is erected on a basis of reward for effort and is stabilized to some extent by a monetary and financial arrangement which measures our individual contributions to its maintenance. The fact that some get more than others and that the financial arrangement does not always work smoothly is not an indictment of the system as a means to an end, provided the system continues to make actual contributions to progress. If we could all bring ourselves to give a maximum of effort to building for the day of maximum comfort for minimum of effort without being spurred to it by necessity, we could abandon our complicated system of reward for effort, and, perhaps, attain a fair degree of comfort for all in a matter of a few hundred years, but we do not all acknowledge the obligation to work in the interest of progress, and a system which forces us to work is the best for progress, and, perhaps, the best for us.

Progress is served by turning as much as possible of our current product into new tools and other instruments of advancement. That means that so long as the surplus over and above necessary consumption goes into the replacement of worn-out tools, the creation of new tools, and the application of scientific discoveries toward the constant reduction of the total volume of work that must be done by hand, we need not worry about how few have the handling of the money which represents our savings for purposes of progress.

III

"Control" Results in Increased Production

Short of fairly convincing proof that co-operative practices in production do not operate to the "detriment of the public interest," there can be no justification of a plea for greater freedom for trade association activities. Fortunately, our experience with co-operation and monopoly during the last twenty years or so, enables us to consider the question of the effect of co-operation on the public interest in the light of actual results.

Intelligent consideration of this question is impossible unless the mind is freed of the confusing ideas derived from the almost universal practice of weighing the results of the productive system in terms of money, prices, wages, profits and the rest.

There is only one measure of the value of a system of production and that is the volume of goods it produces in relation to the consumptive demand. All the other questions arising out of distribution and sharing turn on and are in most cases automatically answered by the results in the matter of the volume of production. Obviously, if the volume of production falls off, the shares of those who participate in its distribution will be decreased, or, on the other hand, will increase with an increase in production.

The fact that an individual has a billion dollars does not mean that his ability to consume goods is greater than that of a man with only a hundred dollars, or less. The ability to consume goods is controlled by physical limitations.

As we have seen, the control of production in the manufacturing and mining fields has been more or less effectively exercised by pools, combinations and trusts for at least 20 years. We may fairly assume therefore that so far as production in these fields is concerned, the results represent the results of co-operation and monopoly. In the same way, since until lately there has been no effort at control in the field of agriculture, we may assume that the results in that field fairly represent the results of haphazard and "unrestricted" competitive methods.

If these assumptions are accepted, a comparison of the results under business-like methods with those under haphazard methods ought to resolve any doubts we may have on the question of the desirability of business-like methods over haphazard methods. A study of the physical volume of production in this country during the last 40 years made by the Harvard University Committee on Economic Research shows that in the 20-year period from 1899 to 1919, which roughly covers the period of more or less effective control in mining and manufacture, the index of the physical volume of production in mining rose from the base of 100 in 1899 to 228.4 in 1919, while the volume index of manufactures rose from 100 to 195.3, and that of agriculture rose from 100 to 139.7. In the same period the population index rose from 100 to 139.7, indicating that agricultural production has not kept pace with the increase in population, while that of mining and manufacture has outstripped the growth of population by large percentages, which means as we already know that the average man is getting more in these goods than he ever got before. If the volume of production had done no more than keep pace with the increase in population there would have been no justification for a condemnation of co-operative methods, for, as we all know, the population of our country has increased at a tremendous rate in the last 40 years, having more than doubled since 1880.

Moreover, the results in 1919 were not the best of which we are capable, as comparisons with the three preceding years will show. In 1918 the volume of production in manufacture was 214.0 against the base of 100 in 1899; in 1917 it was 215.2, and in 1916 it was 218.6. In mining the indexes for the three years preceding 1919, show 279.6 in 1918, against 277.2 in 1917 and 267.0 in 1916. Agricultural production reached its highest point in 1915 with 141.0 against a population index figure for the same year of 133.2. The figures for mining show that with the equipment built up under a system of orderly management we are capable of producing mining goods at a rate which would double the share of every man, woman and child in the country as compared with the shares distributed to the population of 1899. Roughly, the same thing is true of manufactured goods, and it is only in agriculture that the producers have failed to increase the share of each individual in the total product.

As we have said the result expressed in volume is the true measure of the value of a system of production. We also said that given production distribution would take care of itself, and appeared to assert that automatically distribution would be equal. That, of

course, was not our meaning. Increased production does automatically broaden the distribution of goods, but until production is equal to the ability of the community to consume there can be no equality of distribution, either under our system or any other system. However, an approximation of ideal distribution is possible under a system of co-operative efforts which eliminates waste, and tends to equalize the share of each industry in the total product. inequality of distribution is at its worst of course in a system of intensive competition; in such a system there is no order, no knowledge of what the proper share of each industry in the total product rightly should be, and consequently no effort at adjustment.

Under a system of orderly methods, informed by accurate knowledge, the tendency is invitably toward equality of distribution. The inter-actions of industrial units upon one another under such a system is bound to result in the checking of the greed which is inevitable in a system based on ignorant grabbing for the lion's share. An increase in production under a system of "grab" results not in giving more to "capital," but in giving more to the workers in the industry which proves itself to be the best grabber. We have experienced something of this in the last few years as a result of the success of the railroad and other workers in forcing the community to unduly increase their share in the total product.

The worker who increases the production of goods through increasing his effort is clearly entitled to an increased share in the total product. But the worker who "holds up" the community simply because he has the power to do it "grabs" more than his share of the total product and is more of an obstacle to equal distribution than the employer who uses similar piratical methods; that is because there are more workers than employers, and consequently the worker is the larger consumer. If we assume that the employer already has an income which enables him to command everything that his physical limitations allow him to consume, and that the workers have a wide margin within which to increase their consumption it is obvious that an increase in the purchasing power of a single worker will result in a greater reduction in the supply of goods than would result from an increase in the money income of the employer. Where the employer is already able to command all he needs in goods the proceeds of his piracy will go into the construction of more tools and therefore benefit the community, even though the methods by which the gains were come to are in themselves reprehensible. As between the individuals there is obvious inequality, but the remedy lies in increasing the total product to the point at which there will be enough of nearly everything to go around, and not in efforts to add to the inequalities already in existence by numerically important groups of producers demanding more than their proper share of current production.

Next to the question of the results of co-operative effort in trades upon the volume of production, the question of the effects of co-operation and monopoly in the direction of enabling the co-operators to command increased quantities of other goods in exchange for their own is the most important to be considered in connection with a plea for greater freedom for trade association activities.

IV

"Purchasing Power" of Controlled Products Decreases

Agricultural production, as we have seen, has failed to keep pace with the growth of population, with the result that the per capita share of the nation in farm products is now less than it was in 1899, while the per capita share in manufactured and mining products has greatly increased. That is one result of "unrestricted competition," the highly speculative character of the farming business as a result of haphazard methods obviously being responsible for the failure of the farming industry to keep up with the expansion of its market; notwithstanding the common assumption that the "inherent hazards of the business" account for irregularity in agricultural production.

In response to the law of supply and demand, this decrease in farm production and the increase in manufacture and mining production would seem to call for a reduction in the purchasing power of manufactured and mining products and an increase in the purchasing power of farm products. As the results of farm-marketing are reported in "farm prices" and not in the prices at which they go into the ordinary channels of trade, it is impossible to say, so far as farm purchasing power is concerned, whether this law has been fulfilled or not; the most we can say is that so far as the farmer is concerned, it certainly has not operated freely. So far as we know no study of the relative purchasing power of farm products over a long term of years has been made, although numerous comparisons of the relative purchasing power of farm products during the last few years have been made. These show, of course, that the purchasing power of farm products was reduced greatly during the first stages of readjustment and that it has only lately been restored. In this connection, as expressed in prices, it is interesting to note that farm products and steel products hold at about the same level. The sharp slump in farm prices in contrast with the steady and orderly decline or stability in other prices, is, of course, attributable to the lack of co-operation in the farming industry, and to the failure of the farmers to establish protective reserves from the large profits of the three or four years preceding the reaction.

A study covering the essential points of the purchasing power of controlled manufactured products over a period of years has been made by Dr. J. W. Jenks, research professor of government and business of the New York University, in collaboration with Dr. Walter E. Clark, professor of economics of the College of the City of New York. Their study shows not only that the purchasing power of steel products has declined, but also that the purchasing powers of sugar and refined oil have also declined steadily since 1900, thus covering the period which we have assumed as being that in which control was most effective. Starting at a point slightly above the average price of all commodities for the period 1895 to 1900, the price of seven steel products moved steadily downward until at the end of 1914 it stood 50 points under the base line while the index of general commodities moved steadily upward until at the end of 1914 it showed a price over 40 points above the base line and around 70 points above the price of steel. This study seems to indicate that in the period from 1900 to 1914 the purchasing power of a ton of steel declined until in the latter year it would buy only half as much in general commodities as it bought in 1900. The study shows similar, or approximately similar, results in both oil and sugar, and it seems that there can be no question about the effect of co-operation upon real prices. (The study referred to may be found in "The Trust Problem" published by Doubleday Page & Co.)

For those who have no comprehension of exchange values except as they are expressed in terms of money, the showing made by Drs. Jenks and Clark will have little meaning, but fortunately the ranks of those who judge purchasing power by money prices alone are being steadily thinned out. Owing to the inadequacy of the data available for studies of the fluctuations in real purchasing power, absolute accuracy is an admitted impossibility, but absolute accuracy is not called for, and there can be no question about the approximate results.

The reduction in purchasing power indicated is the result of increased efficiency in production, and affects the buying power of units of production and not that of the industries as wholes. It has therefore been accompanied by increased compensation for workers, and increased profits for investors. These increased profits and wages have in turn broadened the demand for the products of the industries, and the total result has been a steady improvement in the wellbeing and comfort of the entire community.

The "public policy" objection to co-operation in business rests on the theory that co-operation is destructive of "initiative and opportunity," two of the foundation principles upon which the theory of democratic government stands. This objection is sound if made against monopoly, but it is and has been our contention that co-operation among small producers offers the only means of preserving the "opportunities" of those already established, and can not result in any additional impairment of the opportunities of those who may desire to enter business.

Statute and judge-made law can kill industry but such laws can not prevent its development along natural lines as long as it retains a spark of life. As we shall try to show in this discussion the tendency of recent court decisions has been against the preservation of the existing "opportunities" of the business interests which are doing their best to survive by following the laws of progress, and in the interest of conditions which will inevitably force consolidations, and an increase in the number and kind of practical monopolies and trusts. In our opinion the "public policy" concept is fighting for the shadow of a thing from which the substance has long since departed, and that in its rage it is killing the thing which most resembles its notion of what is desirable. Adherence to the form of things has been a failing of the orthodox for ages, and it is perhaps too much to hope that the twentieth century will bring any change to minds which close up around the things which first penetrate them.

The institutions of democracy are not threatened so much by changes in fundamental concepts in response to the dictates of experience, as they are by the refusal or inability of minorities to retain the flexibility upon which life and progress depend. A "public policy" which can not command the support of a full court, or which is repeatedly violated in the enactment of "class legislation," can not be much of a policy nor very public.

V

Situation Leading to Enactment of Sherman Law

Before undertaking a consideration of the Hardwood decision, which in some of its aspects, in our opinion, represents a complete reversal of the intent and purpose of the Sherman law, a review of the conditions which led up to the enactment of the law seems necessary. The most striking impression in connection with such a review is a feeling that the law has utterly failed to accomplish its purpose; that it has been futile in almost every respect.

Credit for the repression of some of the evils which gave rise to it has been bestowed upon the Sherman law, but we deny that it is entitled to such credit. The reforms that have taken place in business in the last 30 years have resulted from a realization of error on the part of business itself, and would have, in our opinion, been effected if the Sherman law or its principle had never been heard of. The disappearance of these evils in the places in which they were formerly prevalent has mainly resulted from the disappearance of the conditions which gave rise to them; in other words, business is better because there is no longer a reason for continuing the evil practices; their main purpose has been accomplished, and they are now held contrary to business ethics and interest. Some of these evils still prevail in the "underworld" of business, but the great body of business is just as anxious to complete their eradication as the most zealous of the self-constituted tribunes of the people. If the Sherman law was ineffective in this field in the first place, there is no reason to hope for better results from it in the future.

The Hardwood decision, as we shall attempt to indicate, applies the Sherman law to conditions which are just the reverse of the conditions which resulted in its enactment. It was plainly the intent of the law to meet the conditions that obtained when it was passed and not the conditions that exist now, and did not exist then. But the courts have nearly always regarded the law as an instrument for the repression of natural tendencies in business development, and when they have made it effective at all they have usually made it effective against economically desirable practices. On the whole, however, the courts have generally appeared at a loss as to what they ought to do with the law, and that attitude has been responsible for the chaos and uncertainty which surround it.

The outstanding evil aimed at in the enactment of the Sherman law was "unfair competition." This competition took various forms, and was practiced by the interests which were endeavoring to obtain monopoly control in various field. It included "price cutting" for the purpose of driving out competitors, the exaction of rebates from the railroads in return for large volumes of freight, vexatious and crippling litigation and numerous other practices which were opposed to all ideas of co-operation.

The "combinations" and "trusts" which were formed by those engaged in the elimination of all competition outside the favored few took the form of "pools" and "gentlemen's agreements," but the latter form of arbitrary price fixing was never successful. The "pools" divided territory, "auctioned" contracts and enforced or attempted to enforce "fixed prices" by a system of fines and penalties.

The "pools" failed in their purpose, although they did operate sporadically with more or less effect. The effective forms of monopoly or near-monopoly were those in which the control was centralized and complete, the loose combinations never succeeding in preventing their members from breaking away. In some instances, these forms of monopoly and combination developed after the Sherman law was passed, pools and "unfair competition" being the outstanding factors in the situation at the time the law was put on the books.

The law was, of course, directed against monopoly, but as "cut-throat competition" was the principal weapon of those seeking monopoly control it is apparent that it was not intended to enforce competition, and that it was intended to "restrict" competition, when such restriction was necessary to prevent the accomplishment of monopoly or when it tended to monopoly. The employment of the term "restriction of competition," as the equivalent of "restraint of trade" in a number of the early cases, was finally given the sanction of statutory law in some trust legislation, but the Sherman law itself never mentioned "competition," and the courts do not rely upon the other laws, these laws being practically useless for the reason that they are toothless laws.

The first suit brought under the Sherman law resulted in a victory by default for the Government and resulted in the

dissolution of a small coal combination operating locally in Tennessee.

The "Knight case," which was a "sugar case," was the first case to reach the Supreme Court. In that case the court held that a "monopoly of manufacture" was not a monopoly in "interstate commerce." This position was reversed in the Addystone Pipe case, which reached the Supreme Court in 1899. This was a combination of the worst type. In the interim between these two decisions the court held price agreements between railroad traffic associations to be in violation of the "restraint of trade" clause of the Sherman act. The Northern Securities case was the next in importance. This was the case in which the "holding company" device was placed under the ban, but the "community of interest" effectively established in the process of organizing the "holding company" continues, and the net result was a paper victory for the Government. The same may be said of the Standard Oil, Tobacco and other cases which followed, although the Standard Oil case did not reach the court until 1911.

Earlier efforts to force the National Cash Register Co. to discontinue "unfair" competitive methods were abandoned, and there were other evidences that nobody was really interested in carrying out the provisions of the Sherman Law during a long period. As a result "consolidations" became the rule, and the problem of preventing "unfair competition" soon developed into the problem of protecting the public against the unlimited flotation of what were considered worthless securities. This was the period in which there was so much talk of "watered stock" and the agitation resulted in the enactment of the bill providing for a bureau of corporations, and finally in the Clayton Act and the Federal Trade Commission Act, although the latter act was primarily concerned with modifying the severities of the Sherman Law as they bore upon the efforts of business to function in accordance with the laws of natural development. But as usual, the purposes of the legislation were broken down before it was enacted and a bureau which was intended to be helpful is slowly developing into one of the most pestiferous with which business is forced to deal.

Two or three mild attempts at the modification or repeal of the Sherman Law have been made, but none of them made progress. President Roosevelt made the first distinction between "good" and "bad" trusts, and one of his Attorneys General, Mr. Moody, in his annual report for 1906, held that there were three defects in connection with the Sherman Law, its indefiniteness, its prohibition of the co-operation demanded by the tendencies of modern business, and a lack of adequate machinery for investigations. President Taft, who was his own spokesman on the subject of the Sherman Law, and an active prosecutor, took a stand in opposition to the repeal or modification of the law, although he also proclaimed the doctrine that "bigness" does not imply "badness," indicating that, in his opinion, the law need not be held to be an obstacle to natural economic development as long as the development was carried out sanely and justly.

The Hardwood Lumber case was the first case in which the practices of modern trade associations, organized under the so-called "New Competition" plan, were ever before the Supreme Court.

VI

The "Hardwood" Decision

Against our background of economic commonsense, the majority opinion of the Supreme Court in the Hardwood Lumber case is a startling and amazing decision, and we agree with Mr. Justice Holmes, who, in speaking of it in a dissenting opinion, said: "I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable."

In another place Mr. Justice Holmes, also said: "But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at transitory cheapness unprofitable to the country as a whole because not corresponding to the actual conditions of the country,"

In reading the majority opinion in this case, we are conscious of two things, one is a feeling that it proceeds from a presumption of guilt, and the other is that it is wholly uninformed by modern economic thought.

It may be that under our practice the law as laid down in the leading cases interpreting the clauses of the Sherman Act, which were in question in the Hardwood Case, left the Court little freedom of action for taking a commonsense view of the case; at any rate, the majority began their consideration of the case by citing the law interpreting "restraint of trade" as set out in the Northern Securities and preceding cases to the effect that any combination which by its necessary operation "destroyed or restricted competition" would be held to be a "combination in restraint of trade." The statute itself does not mention "competition," or the restraint of competition; it merely prohibits restraint of trade.

The court was not under the compulsion of following the precedents of the Northern Securities and preceding cases, a fact which the court itself has made plain by developing its famous "rule of reason" line of decisions in monopoly cases.

Furthermore, the court cited its own decision in the Union Pacific Railroad case decided in 1912, as showing that it was the purpose of Congress in enacting the Sherman law "to preserve from 'undue' restraint the free action of competition."

So, if we accept that case as covering the applicable rule of law, the modification "undue" seems to have left all the room that was needed for bringing the law into line with modern business practices and necessities.

But, as we have said, our impression is that the majority were not concerned with attempting to find a rule of law that would permit the hardwood lumber men to follow the sound practices, which appear to us essential to an intelligent conduct of their business —quite the contrary.

As outlined in the deciding opinion, the Hardwood Association's "plan" provided for a daily report from all members covering all actual transactions, giving grades, prices and special agreements; a daily shipping report, with details; a monthly production report with grades and thicknesses classified as provided by the plan; the monthly filing of price lists, and immediate notice of changes; and for inspections for grades by inspectors employed by the association.

The information thus furnished was compiled in detailed form and transmitted to all members, the sales and shipping reports going out weekly, and the stocks on hand and price reports monthly. In addition, the plan provided for a monthly market letter giving "changes in conditions, both in the producing and consuming sections, a comparison of production and sales in general and an analysis of the market conditions." Monthly meetings of members were also provided for.

In the opinion of the court, "this extensive interchange of reports, supplemented as it was by monthly meetings at which an opportunity was afforded for discussion of all subjects of interest to members, very certainly constituted an organization through which agreements, actual or implied, could readily be arrived at and maintained if the members desired to make them."

But these activities, of course, provided the members of the association with information of inestimable value to them in the intelligent conduct of their business, and gave them opportunities to become acquainted with one another in the interest of increased confidence in the reports made to the association, as well as opportunities to discuss conditions as they affected their interest, and these were the things the association claimed to be the purpose of its organization.

In view of a contention made on behalf of the association to the effect that it was engaged in exchanging "past information" only, which was necessarily true so far as the essential information was concerned, the majority of the court regarded any attempt at "forecasting" either in the association's monthly letter or by members at meetings or otherwise, with

particular suspicion. All opinion in the nature of forecasts, whether expressed in connection with the lumber market or any other market, is necessarily speculative, degrees of skill notwithstanding. Yet the majority, in their opinion, seem to invest the "forecasts" and "interpretations" of the "statistician" and members of the Hardwood Association with especial significance, mainly, we feel, because they were convinced that the claimed purpose of the exchanges of information and opinions to give the members the benefit of a sound basis for acting in conformity with revealed market conditions was a mere subterfuge.

But we see nothing in the court's opinion which leads us to believe that it would be more tolerant of an association doing essentially the same things in a more modest and less obtrusive way.

Letters sent out by the "manager of statistics," which appear to us to have been nothing more than "boosting letters" intended to hold the association together, are interpreted unfavorably, and there are other aspects of this particular case which perhaps justify hopes that the court may modify its position in subsequent cases.

However that may turn out, it is clear that there is no basis for such a hope, that we can see, at any rate, in the general tenor of the majority opinion. The exchange of such information as was provided for in the Harwood "plan" is the very reason for the being of a trade association, and the court has said "very certainly only the most attractive prospect would induce any man to give it to his rivals and competitors," with the plain implication that an "attractive prospect," in the opinion of the court, was such a prospect as would promise members of the association some undue advantage or other.

Advancing prices — notwithstanding that they occurred in a period of general advances—resulting from a better understanding of market conditions and warnings by "experts" against increasing production in times of slack business were accepted as convincing proof that the members of the Hardwood Association were banded together for the sole purpose of decreasing production and raising prices. In this connection, the court said: "If it (the association) did not stand a confessed combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved."

And the decree enjoins the defendants from compiling, printing or distributing "stock reports — production reports," "sales reports of the open competition plan," or similar reports.

Three months later a Joint Agricultural Committee, appointed by Congress, recommended as a first step in the improvement of the conditions of the farmer "organization of knowledge of marketing and distribution and agricultural statistics."

May the saints preserve us!

VII

The Effect of the Hardwood Decision

Supreme Court decisions interpreting the Sherman law are fostering big corporations-trusts!

In the United States Steel case, the Supreme Court of the United States in effect said: The control of 50 per cent of a basic industry by a single corporation will not be held to be in violation of the anti-trust laws, provided the power incident to such control is not wrongfully used.

In the United Shoe Machinery case, which involved monopoly rights based on patents, the court said, that control of over 90 per cent of an industry would not be held to be in violation of the law, if the control were exercised by a "good" trust.

But in the Hardwood Lumber Association case the Supreme Court found that an association composed of 470 individuals and corporations controlling 30 per cent of an industry and engaged in the exchange of information in an effort to conduct their businesses in an orderly and intelligent manner was in violation of the restraint of trade section of the Sherman law.

Dissenting from this opinion, Justices Brandeis and McKenna, following a reference to the decision of the court in the steel and shoe cases, said: "May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolation? And if they do, may not another huge trust with highly centralized control over vast resources, natural, manufacturing and financial, become so powerful as to dominate competitors, wholesalers, retailers, consumers, employes, and in a large measure, the community?

Speaking in support of a bill seeking to remove farmers' associations from the control of the Sherman law, Senator Norris, of Nebraska, recently said: "I said a while ago when I started in on this line of argument, that whether the Supreme Court or any other court decided that any trust was not a trust, or decided that it was a trust and dissolved it, the result was always the same; they kept right on."

In deciding the Hardwood case the court refused to budge an inch from a strict interpretation of the Sherman law. It did not attempt to determine whether trade associations are divisible into "good" and "bad" or whether they serve the economic interest of the country; it simply held that the facts presented showed a violation of the restraint-of-trade section of the Sherman law! The facts in the Shoe Case also showed the existence of a practical monopoly, not only of patented machinery, but of all machinery used in the manufacture of shoes.

Are trade associations, which are usually made up of hundreds of small manufacturers and traders alone, to be held down by the trust laws? Are big corporations, farmers' associations and labor unions to be allowed to operate without restraint, while little business is held in check perhaps until all the small manufacturing and trading concerns have been gobbled up by the big and benevolent trusts?

Farmers' associations, big corporations and labor unions all have a place in the economy that is trying to emerge out of the chaos of the past 30 years of blind struggling for survival. We do not regret the "rule of reason" which has allowed big corporations to develop in accordance with natural law, nor do we oppose the efforts of the farmers to obtain their freedom from the Sherman law. In our opinion, all of these developments have served the interests of progress.

But we are opposed to the tendencies disclosed by the court decisions, which Judge Brandeis says are likely to drive small business men into combinations. At the present stage of development and for some years to come, the interests of the people will best be served by the checks and restraints upon one another, which grow out of the opposing natures of trade associations and trusts.

Little businesses, which depend on outside sources for raw materials and other supplies, can never compete successfully with integrated corporations which produce everything they use from the raw material to the finished product. But they are a check on the big corporations, and the big corporations are a check on them.

"Policy" self-restraint also, of course, plays a big part in the management of big corporations, even when we are in the midst of the phenomena of runaway markets, during which anything goes.

The dissolution of trade associations at this time or in the near future, in compliance with the law as now laid down, would involve too great an immediate loss in equipment and business acumen. Consolidations mean the abandonment of factories as well as men and prevent the conversion of equipment to other uses. We cannot afford the waste!

Trade associations tend to conserve and stabilize. In the long run they will attain the same results in the prevention of overdevelopment that big corporations attain, but they will do it by degrees—let us down easy.

The things the trade associations want to do in the interest of sound business

and prevention of waste are the things that no court or power has the right to forbid a single corporation or individual to do; that is, to exchange information concerning capacity, wages, consumption in domestic and foreign trades, stocks on hand, rate of production, past prices and other facts necessary to the formation of a sound judgment of the state of trade. A single corporation controlling the lion's share of an industry has all of this information in its hands, or can afford the cost of collecting it.

The Supreme Court said in the Hardwood case that the collection of this sort of information by a trade association was not of itself a violation of the Sherman law; it was the "distributing" of the information, or the manner of distributing it, that broke the law.

Secretary Hoover has been the pioneer among officials in the fight to free trade associations from the toils of the Sherman law. The Hardwood decision interfered with a plan worked out by the secretary for the purpose of giving wider circulation to trade information, and for the encouragement of these associations in performing the functions they must perform if the interests of progress are to be served. Mr. Hoover appealed to the Attorney General for assurances that he, the Secretary of Commerce of the United States, who is required by law to foster trade, would not be interfered with if he proceeded to foster it.

The Attorney General declined to give the Secretary of Commerce the necessary assurances; he said that he could see no objection to many of the activities outlined in the secretary's letter, but made it p'ain that he would be guided in enforcing the law by the "results" of the operation of the plan.

Business already knows that it can operate trade associations or anything else so long as it does not violate the law. The thing it does not know, and the thing that neither the Attorney-General nor the Supreme Court has told it, is what is a violation of the law.

VIII

Self-Government in Business

Like man himself, industry must work out its own salvation.

Every group of men, trade associations the same as others, has its small leaven of those who want to do right for the sake of right—men with understanding, with a sense of obligation and appreciation of the value of restraint as an instrument of self-interest. Men of this type must be given an opportunity to work their will against the predatory, the primevally vicious and violently rapacious, or else we might as well abandon ship right now and let the industrial age go down into the oblivion which has engulfed every other civilization man has attempted.

We use the "honor system" in our colleges, in our ordinary intercourse, and even in our prisons, but we have so far declined to use it in dealing with business. We do not mean that acts which are clearly criminal or vicious or subversive of the general interest should not be declared illegal by statute. On the contrary, we believe that they should be covered by the tightest and strongest criminal statutes that can be enacted. But there is a vast difference between a law which defines a criminal offense and provides for its adequate punishment and a blanket statute which casts doubt upon almost all modern business operations. If the ends of progress are to be served, individuals and trade associations must have room for freedom of action, and the public must rely upon the good sense of the leaders in various fields to direct development with an eye to its interest. The wide distribution of ownership through the medium of corporate stock has resulted in numerous instances in placing the control of big business in the hands of men who are largely free of the domination of the profit incentive and the instincts of greed, which our laws say are the primary motives which move men to oppress and stamp down their fellows.

The best example of restraint on the part of large interests with a sense of obligation to the public and an appreciation of its own interest was furnished by the action of the steel industry under the leadership of the United States Steel Corporation, in refusing to advance prices during the period of general advancement following the war. Economic conditions, inflation, and a world-wide demand for goods left producers free to charge practically any price for their products during that period, but the steel industry, and particularly the United States Steel Corporation, refused to take advantage of the situation, and continued to supply patrons with steel at relatively reasonable prices.

The foresight and sense of obligation shown by the United States Steel Corporation and others during that period was a manifestation of the spirit which permeates all intelligent industry today and which can be developed where it does not now exist. But we cannot hope for "policy" conduct on the part of business men as long as we seek to restrain free development and keep the intelligent leadership of industry busy in the evasion of obstructive laws. The interpretations of the Sherman law have not been opposed to the development of big corporations, but the blind efforts of the law enforcers to make their conceptions of the law effective threaten even the big corporations.

IX

English Law Follows Economic Progress

The strangling hold of the Sherman Law on industry is merely one result of a pernicious tendency on our part to convert the body of the common law into statutory form.

At the outset our common law covering combinations in restraint of trade and monopolies was the same as the common law of England, our common law and the English common law being drawn from the same sources. But England and her colonies, for the most part, adhere to the common law, while we have more and more leaned to the reduction of our law to the rigid, inflexible and unswerving form of the statute. The Sherman Law, which shackles our industry to an outworn and discredited conception of the economy of our country, presents an outstanding example of the evils of static laws.

There is a vast difference between statute law and common law. Through statute law individuals and groups impose their ideas of morals, business conduct and any other little thing that comes into their minds upon the rest of us whenever they can persuade enough lawmakers to do their bidding. Statute laws are akin to edicts, decrees and all the other forms of oppression, which the tyrants of old exercised either for the good or ill of the people. The common law is a growth, an expanding body of custom and usage, founded upon the ways of the people; it is, in effect, a folk-made law, as defined and directed by the courts. If the people, or business, or others adopt a certain way of doing things by common consent, the courts conclude that that way is the best way, and give it the sanction of the law. Briefly, the common law allows the genius of a people or a system to find expression.

They still follow the common law in England, and as a result working from exactly the same basis from which we started their laws covering combinations in restraint of trade and monopoly have developed in a direction directly opposed to our law, which means that they have fitted their laws to their economic growth, while we have stunted our growth to fit our laws.

Our courts have disclaimed any interest in the effects of the Sherman law (statute law) upon economic development; have been heedless of the question of the larger public interest, unconscious of economic tendencies; have seen nothing but the "verbotens" and the "thou-shall-nots" in the law and have cared for nothing but its enforcement in conformity with the spirit which animated it when it was enacted 30 years ago.

What we say here is backed up by what the courts themselves have said: In the case of the Standard Sanitary Manufacturing Co. against the United States, the Supreme Court, in speaking of the provisions of the Sherman law, said: "Nor can they be evaded by good motives. The law has its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of the parties, and it may be of some good results." The court later modified this view somewhat as regards monopoly, but it appears adamant where trade associations are concerned.

Furthermore, the Supreme Court has said that the Anti-Trust law has a broader application than the common law, which would seem to mean that statute law can grow and become more oppressive, and that the people have lost their right to make "common laws" and that their industry, economy and all of their vital interests must be kept within the bounds of statute law once it is enacted forever and ever.

This view of the law is based on the assumption that in the enactment of the Sherman Law the people of the country adopted a permanent policy for the enforcement of competition between individuals and corporations. The courts have, however, managed to show more veneration for the restraint of trade provisions of the law than they have for its monopoly provisions. Four hundred and seventy individuals and corporations organized into a trade association cannot control one-third of an industry without engaging in restraint of trade, but a single corporation can control 95 per cent of the shoe machinery industry and not violate the monopoly provisions of the law.

In the case of the United States against the Chesapeake & Ohio Fuel Co., the lower court in granting an injunction said: "It is said, however, that the increase in the volume of trade, the competition in a larger field of operations, the better conditions of the product, and the maintenance of reasonable prices, resulting from the performance of the contract, benefit the public and justify the partial restraint of trade. But the policy of the law looks to competition as the best and safest method of securing these benefits and not to combinations which restrain trade."

That decision was handed down over 20 years ago; the law was then looking to competition for the benefits which can be had from co-operation only, and it is still looking. Must we ignore the

experience of the "20 years that have elapsed since the policy of the law" usurpation was first pronounced, and refuse to use the enlightenment which we have received upon these questions in order to adhere to a system of law which should never have been placed on the statute books?

In the case cited above, the Circuit Court of Appeals in affirming the judgment of the lower court said: "It is not for them (the courts) to inquire whether it be true, as it is often alleged, that this (refusal to consider the beneficial aspects of combinations) is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public."

Here we see statute law in all its pernicious glory. What has England been doing under the common law, starting with the same principle of law, and from almost identical trade and economic conditions? In the leading case moving away from the theretofore accepted principle of the common law, the English courts, two years before the Sherman law was put on our statute books, held in the Mogul Steamship Co. case that a combination of steamship companies entered into for the purpose of holding up the freight rate on tea from China would not be disturbed, if it appeared that the combination gave China and England a steamship service that they otherwise would not have had even if the combination did charge high rates for carrying tea.

The English or the British have even found a way to interpret their statutory laws so as to conform with progress and the needs of the times. Australia has an anti-trust law almost word for word the same as our Sherman law, but the Australian and the Empire courts have not allowed the law to stand in the way of commonsense development. In the case of the Commonwealth of Australia against the Adelaide S. S. Co., the Privy Council, in reviewing and confirming the decision of the High Court of Australia, said: "It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to the minimum. Where these conditions prevail the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of work, less coal will be produced and prices will consequently rise until new mines are opened." From which basis, the court held that a clause in the Australian anti-trust law prohibiting acts "detrimental to the public" included detriment to miners and mine owners as a part of the public, saying: "There is in this respect a solidarity of interest between all members of the public." In other words, under the English decision the "consumer" is not all of the public; he is only a part of the public.

Some of our judges have shown a disposition to interpret the anti-trust laws in the light of common sense, but except in a few instances involving monopoly and not restraint of trade the judges so disposed have never formed a majority of the court. In the Hardwood case, Justice Holmes in commenting on the majority opinion, said:

"I should have supposed that the Sherman act did not set itself against knowledge—did not aim at transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides." But Mr. Justice Holmes was wrong!

X

Stabilization Universally Demanded

Trade and industrial stabilization is demanded by everybody. The people are tired of booms and hard times, periods of depression and periods of prosperity; they want regular work, regular incomes and regular meals. Three square meals a day every day are better than banquets every three years or so, with soup kitchens in between.

Irving Fisher, professor of political economy at Yale, proposes to do away with "business cycles"—alternate periods of depression and prosperity—through "stabilization of the dollar," and the Farmers' Conference recently held in Washington recommended that a solution of the problem of stabilization be sought through some such plan as that proposed by Professor Fisher. The Fisher plan has been condemned by business men and bankers as impractical. Certainly it involves new departures, new ideas of finance and distribution. This country has done all the experimenting with monetary standards and systems that it cares about. The average mind finds it difficult enough to understand the relatively simple money system now in use. Professor Fisher's plan would increase these difficulties, the more astute would find a way to "beat" the system, and the efforts of the common man to follow it would result in confusion and probably nullify any good that plan might otherwise do. Recent developments have shown that money and monetary systems do not always operate in accordance with theoretical laws, and it is doubtful if Professor Fisher himself is as cocksure about the theory of his new plan now as he was a year or two ago.

Anyway, stabilization through organization in industry not only offers a simpler plan for getting virtually the same results as are promised from the "stabilized dollar," but it conforms to custom and habit; offers a natural development from the things that went before it; is evolutionary, natural progress, pragmatic.

Stabilization can be attained by trade associations through the exchange of information, through the maintenance of expert investigators and analysts—in brief, by knowing their business and avoiding overproduction. Under the present system, the trade associationist makes his depression profits by averting losses. He sees hard times coming and holds down and is not caught with big stocks of goods produced at a higher level of costs than they will bring in a demandless market and at a lower general price level. Nobody can object to that—it's common sense. The haphazard producer, the reckless manufacturer is the real menace to society, order and regular meals for workers.

Most of the evil practices of which trade associations have been guilty grew out of the state of morals developed by habitual evasions of an oppressive law.

The very ends which the trade associations seek is a guarantee of stabi'ity. They are out to reduce the element of speculation in business; they want to know the markets for their goods, and the state of the supply markets, upon which they depend. In practical operation, the trade association spells stability with greater production, for each association will measure production to prospective demand, and in time the great object of every industry will inevitably be the increase of consumption of its product as a means to increased profits.

Prophecy aside, and looking the situation squarely in the face as it stands today, there is no question as to the choice between trade associations as they are and forcing the formation of more trusts.

A corporation like the Steel Corporation produces everything it needs, and will continue to be able to undersell the small producers of finished steel products who depend on other producers for their raw materials until the small producers get together and para'lel the organization of the steel corporation. Here we have competition, if anybody still believes mere price competition is desirable, and will continue to have it for a long time if the trade associations are not forced out of business and the fie'd left exclusively to big corporations. We need both the big corporations and the trade associations, the big corporations to show the way and to compete with the trade associations, and the trade associations to educate the average business man in the ways of order and to instil in him a sense of duty and obligation to society.

XI

Business Cycles the Basis of Unrest

The worker's fear of losing or being left without a job in the competitive struggle for a living, which Dr. Charles W. Elliot, president emeritus of Harvard, says is the psychological basis of "unrest," arises out of the average man's experience and alternate periods of boom and depression in industry.

Practically all modern and even some of the classical economists are agreed that booms and depressions, "business cycles," are inevitable under a system of reckless competition. "Overproduction," or the thought of it, frightens the worker quite as badly as it frightens the manufacturer. As a matter of fact, it was long, and still is to a less extent, a popular belief among workers that the "bosses" conspired to pile up great quantities of goods as a part of a great scheme for the "exploitation" of the masses.

Moreover, there was a foundation for the belief. Some manufacturers, probably a majority of them, formerly nursed the delusion that it was good business to produce a surplus under high pressure conditions, then shut down and wait to dispose of it at their leisure. Under the competitive conditions which prevailed back in the '90s there was even a possibility of a profit in such a scheme.

Whatever advantage the plan offered in the 90s and after, it offers them no longer. The modern manufacturer knows that his own labor is one of the props of his market and that when his labor is idle the demand for his goods falls off. The reduction in purchasing power incident to the unemployment growing out of overproduction is felt by the manufacturer of steam tractors, which his workers of course do not use, quite as much as it is felt by the manufacturer of hats and shoes whose labor is a direct consumer of his products. In the days when the farm demand was 75 per cent or more of the total, individual manufacturers reaped an advantage from "overproduction," but industry as a whole suffered even then. The increased power of labor in bargaining in the matter of wages has also worked against the surplus theory of production as a means of profit.

The mortality rate among manufacturers during the last few months from surplus goods produced at high costs will linger in the minds of this generation of producers as long as it lives. Furthermore, we are shortly to discover that even the theory that we can profit by selling surplus products abroad for less than we get for them at home is erected on a foundation of sand.

The world's inability to do the things it ought to do in order to be sensible and serve its own interest is understandable. The slow process of working out of one stage of development into another is due to the chains which hold us back to the old things. These chains are made up of deep-rooted interest and old ideas, and the chains fashioned of old ideas are, perhaps, the strongest. A sudden transition, a jumping from the things that are straight into the ideal, would involve waste and hardships, perhaps greater than the ideal is worth, or at least greater than the immediately attainable is worth. We cannot scrap the world for a theory.

But we can refrain from interfering with the things that are working in the right direction, and we can even foster them. In order to do even that much, however, we will have to scrap some of our old ideas. We must, for example, get rid of the idea that competition is the "life of trade," or, if it is the life of trade, that in an unrestricted and reckless form it has any value.

When we undertake to cut economic growths in order to make the body of our economy fit the ideas of a by-gone generation and time, we are simply doing a ghost dance before old images. And ghost dances are dangerous, they take us back, and they stir old forgotten emotions and springs of action.

The old-time manufacturer was not alone in hugging delusions; he may have believed, as he is said to have believed, that he could make money by piling up goods at one time and letting his factories lie idle at another, but if he believed that he could make money by glutting the markets, or increasing the visible supply of goods, the worker believed that his interests lay in preventing his employer from doing that very thing, and was committed to the labor policy of restricted production. The worker based this policy on the theory that the less goods he made, the longer he would be making the goods the world wanted, and the longer he would keep his job.

Today the intelligent worker knows the difference between "real wages" and "money wages," and understands that the more goods he produces the more he personally is likely to get. Still the old idea of "holding down" persists, and is preached today by ignorant labor leaders, or at any rate by labor leaders. Most labor leaders, like most men in other walks of life, look to their own, or the immediate interest of those they represent, or lead. They think more of increasing the pay, or keeping the jobs of the members of their unions than they do of the

larger question of the ultimate interest of the worker, or of building up a sense of responsibility to the public and the general welfare.

When business men change their attitude of complete self-interest, the workers and the labor leaders will change too. The labor leaders have almost always taken their cue from business men; in fact, the most practical of them pride themselves on being good business men, and they are. But business will not and can not change until it is relieved of some of the restraints, which unnecessarily and foolishly hamper the best elements in it from dominating its policy.

As it stands today, snapping its one remaining tooth at the shrinking trade associations, the Sherman law is a menace to progress, along the lines of natural development to steady jobs, and is, therefore a prime cause of "unrest."

Aside from outright monopoly by big single corporations, the trade association offers us our only protection against the evils of over- and under-production, and our only hope of stability.

Over-production means decreased profits for manufacturers, decreased wages and increased idleness for workers, and benefits nobody, except a few speculators who happen to have the means to finance the surplus goods the manufacturer is forced to throw on the market. The theory that the consumer is entitled to profit by the mistakes of the producer may be all right as a theory even if it is utterly immoral and inequitable, but it is only a theory now, and that is about all it ever was. We are all "the consumer," and when we are without jobs and the means to pay for surplus goods produced by a haphazard competitive system we get very little out of the misfortunes of the producer. The wreckers who in the old days used to set beacon lights to decoy ships onto the rocks called the salvage that washed ashore "Godsends." Our laws do not permit the consumer to set false beacon lights for the producers, but they do forbid the producer to take precautions against being wrecked.

Industry is undergoing a readjustment which must be prolonged and orderly if it is to avoid disaster. The world is oversupplied with equipment in some fields and undersupplied in others. The international struggle for trade which seems to be impending calls for a titanic "shake out," the elimination of the weak and the survival of the fittest. That is a wasteful, illogical and unnecessary method of correcting past errors, but the errors must be corrected or the system will smash, and, if we obstruct the normal ways of progress, she will have her way even if she has to destroy everything we have done and start all over again.

XII

Deflation Versus Inflation

Troubled as we are by the problems of recovering from the bad effects of a period of "unrestricted competition," it seems foolish to waste time pointing out the evils of the system; yet in a discussion suggesting the modernization of the Sherman law, it is necessary. We have become so accustomed to "ups and downs" in business and industry that we now regard them as necessary and unavoidable, and spend most of our time and thought on getting down when we are up and getting up when we are down. We talk about "deflation and inflation," taking first one side and then the other, as if they were normal processes in a perfectly sane and reasonable system of economy.

We employed "deflation" as a cure for 'inflation" and having found that the cure was worse than the disease we are now considering inflation as a cure for deflation. Certainly Alice never encountered anything in Wonderland that was "curiouser" than that. But, as nonsensical as it all seems, there is really no other means of correcting the extreme fluctuations in prices and industrial activity under a system of "unrestricted competition." That brand of competition calls for blind, ignorant, reckless striving to get ahead of the other fellow, and frowns upon co-operative practices which tend to check the very evils which force us to try to keep our balance by alternately using inflation and deflation.

We say "using" deflation and inflation because that is what we now do. Under "natural" conditions developed by the so-called system of unrestricted competition we used the terms booms and panics to describe these things in their spontaneous forms. The improvement in our banking system has given us more control over these wild things, and we now refer to them as "inflation" and "deflation," terms which formerly applied strictly to the condition of currency and circulation.

It is utterly silly, of course, to spend our time controlling destructive economic movements which can be killed off before they start, but if we must adhere to the old evils we prefer "natural" deflation via the explosion to "controlled" deflation. Controlled deflation results in two things which are undesirable—prolongs readjustment and permanently impairs confidence.

It is possible that "next time" more business men will heed the warnings, but that is the trouble; after this business will spend more time looking for danger signals than it will spend in attending to business.

It is not generally appreciated, but confidence is a more potent factor in business than credit. As a matter of fact, confidence is the basis of credit, not only in the narrower sense of confidence in the integrity of the borrower but also in broader sense of confidence in the general business situation.

Impaired confidence was a major cause of persistent high prices in the midst of one of the worst periods of business depression in our history. Mr. Samuel Untermyer says that high prices are due to "unlawful combinations," but Mr. Untermyer made that statement because it suits his purpose in his effort to subject business to more regulation, and not because he knows anything about the cause of high prices. Current high prices at the time were immediately due to "hand-to-mouth" production and buying. Distributors keep their stocks at a minimum because they lack confidence in the future, and producers keep their production at a minimum for the same reason.

There is not much question about our ability to do away with inflation and deflation almost entirely. But we shall have them either in their controlled or uncontrolled forms as long as we stick to our old ideas about unrestricted competition.

In another place we shall endeavor to show that the alleged advantages of unrestricted competition do not exist outside of our minds; that we in fact have no competition worth the name between sellers in boom periods, and that practically all of the competition we have between them at other times will be just as effective under a system of intelligent production.

In view of these facts it is apparent that we stand to lose little or nothing by giving up old ideas in favor of "The New Competition." The losers under any change of methods would be those who profit from the troubles of the majority which arise out of unrestricted competition.

In exchange for the surrender of nothing more than an idea we can place ourselves in a position to do away with the evils which are inherent in the condition which is described as unrestricted competition. We do not call it a system, because there is nothing about it that suggests system. Everthing that is done under unrestricted competition is done haphazardly, ignorantly and recklessly. Too many enterprises enter the same fields, with the result that production is irregular, and so is employment. At one time all the wheels of an industry are turning and at another time none are turning. Today the output is tremendous and tomorrow it falls away to nothing.

XIII

The So-Called "Competitive System"

In this place we propose to attempt an analysis of what official Washington means when it speaks of the "competitive system." According to our understanding of the official use of the term, it might as well speak of the "chaotic system."

There are three possible definitions of the term "competitive system," which relate to economy. The first in order of importance covers the concept which holds that man is engaged in a struggle for existence with man; a concept opposed to the idea that man is, in fact, engaged in a struggle with nature. This idea of struggle is based on the theory that potential demand for food and shelter is greater than the potential supply, and that men are, therefore, necessarily engaged in a struggle for unequal shares, in the hope, of course, that each will get more than his share.

The opposed theory, that with modern equipment and labor, man can wring a practically unlimited supply of everything he needs from nature, is now the accepted theory, and is the basis of the trend of economic development and thought toward co-operation. This is, of course, not the "competitive system" of which official Washington speaks.

Next in order we have the "competitive system" as a field of "opportunity," as an incentive to labor, and "saving" as a medium for the attainment of individual ambitions, meaning by ambition a desire to secure wealth and power. In this sense, the term is used in explanation and support of the "capitalistic system" and, therefore, does not refer to a system, but to the attributes of a system. To those who regard the capitalistic system as essentially sound and beneficent from the standpoint of the general welfare, these explanations and justifications are puny. Official Washington, in part, possibly relates its idea of the "competitive system" to some of these attributes of capitalism, but so far as the administrative side is concerned that is not what is meant by the phrase either.

The "competitive system," as this side of Washington sees it, is a system under which the producers struggle with nature for the benefit of consumers. In other words their concept of the "competitive system" is a sort of buyers' paradise, in which producers labor unremittingly in the production of goods to be offered in the markets in larger quantities than the markets demand at continuing concessions in price. That is an extreme statement, but it describes the logical result of what official Washington appears to be talking about.

As a matter of fact, official Washington, when it speaks of the "competitive system," is not talking about anything that it can explain except a phrase. It has a vague recollection of a condition in which competition was a phase of economic development, but it never believed in unrestricted competition even then. The Sherman law itself was enacted for the purpose of restraining competition. The Federal Trade Commission act was passed for the purpose of preventing "unfair competition."

Any limitation upon free competition is a negation of the idea of a "competitive system," even if the term has any meaning at all. To our way of thinking, the term has no meaning, as we regard competition in an unrestrained struggle for supremacy or survival as the same thing as chaos, and as being suicidal.

There is no historic basis for the argument that ours is a "competitive system" aside, perhaps, from the phase referred to in the transition from the simple economy of the Middle Ages to the somewhat more complicated economy of modern industrialism.

Man has always co-operated in his struggle for existence; has never even in the passing phase of competition indulged in the extreme individualism of anarchy. We do not refer, of course, to the struggles as between groups as represented first by the family, then by the clan and then by nations.

The ideal co-operation lies far in the distance, when the adjustments which will allow complete co-operation between nations have been completed.

What we mean when we say that man has always co-operated in his struggle for existence is that he has always joined forces with those around him. War is essentially a co-operative enterprise, and man has spent most of his time on earth in making or preparing for war. The manorial system and the guild system of the Middle Ages were co-operative; even the serf and slave systems were co-operative fundamentally. The fact that the strong and powerful kings, chieftains and barons did no physical labor and lived on the cream of the land in those days did not affect the fact that those over whom they reigned were engaged in co-operative production.

Back of the idea of the "competitive system," as a system which offers particular advantages to consumers, we encounter the old idea that "price" rules the world. As a matter of fact under a system of regulated and stabilized production price would be of little importance to the great major-

ity of consumers. Under conditions of haphazard production, price is important to various classes of consumers, those whose incomes are fixed either on account of being derived from fixed returns on investments, or fixed salaries, such as public officials, or those who occupy economically weak positions, which prevent them from forcing their incomes up to the level of increased prices.

But under a condition of stabilized production the adjustments necessary to bring all consumers into relatively favorable positions would inevitably follow. We do not live by money we live by bread. The price we pay is governed by our ability to pay, as well as by the supply of the thing we buy.

Any "system" which decreases the supply of needed things is a bad system, regardless of prices. And, conversly, any system which increases that supply is a good system.

We are sure that nobody will contend that a "system" which results in alternate periods of booms and depressions is conducive to increased production, and, therefore, to greater consumption. That being so, we are unable to see what advantage the consumer could derive from it. We all know that such booms and depressions are characteristic of a system of unrestricted competition and haphazard production, for we have experienced it. So, even if we admit that there is such a thing as a "competitive system," we must also admit that it benefits nobody, not even the much-petted consumer.

Official Washington, we fear, is worrying about its ability to control the producers once they are permitted to co-operate in the interest of the elimination of waste, and for the purpose of reducing production to an ordered and scientific basis. In our opinion, there is no basis for this fear. There is a very simple test of the value of co-operation to the public. A decrease in production in the midst of an active demand, which could not be explained by conditions over which the producers had no control, would be a confession of an intent to mulct the public. The fact of such a decrease in production would be revealed by the very statistics which the association themselves gather statistics which in our opinion revolutionize methods for the control of "combinations in restraint of trade."

XIV

Dangers of Monopolistic Control Remote

Ignorance of the mechanics of price making, and, perhaps, a reluctance to help destroy so valuab'e a political asset as "class hatred," has led some of those whom we believe are honestly seeking to serve the general welfare into the error of maintaining that "regu'ated monopoly" and "price fixing" must necessarily follow the repeal of radical revision of the Sherman law. As a result of expressed opinions to this effect by these honest, but misguided, seekers after the general welfare, the hearts of all that quaking fraternity of business men who fear "something worse," have been set fluttering anew.

We, therefore, find it necessary to diverge somewhat from the planned course of this discussion dealing with the evil results of attempts to regulate economic law by statute in order that we may try to reassure the timid and set the misguided straight. We are not assuming any special wisdom in this particular, as the errors involved are patent to all who are even superficially acquainted with the history of business and industrial development since the enactment of the Sherman law, and to those who know the rudiments of modern economy.

Historically considered, we have not yet reached a stage of monopoly in any important industry, and if the Sherman law is modernized, there will be no ground for fears of monopoly for many years to come—many more years than anybody now living will see. If we keep the Sherman law on our statute books in its present form and if the courts adhere to the lines of interpretation laid down in the Hardwood case, practical monopoly in most industries is only a matter of time, a short time. Mr. Justice Brandeis, who is a keen student of economic history, as much as predicted that result in his opinion dissenting from the findings of the majority in the Hardwood case. If Mr. Justice Brandeis' conclusions are justified by the facts and the reasonable probabilities, it seems to us that "monopoly regulation" and price fixing" are more likely to result if we keep the Sherman law as it is than if we modify it. The timid business man had better begin to think about that phase of the matter, or so we think.

The assumption that "trade associations" are another name for monopoly has absolutely no foundation in fact. So-called trade associations, which are in reality nothing more than outright combinations, do function as monopo'ies in some localities, but these so-called trade associations are as different in form and purpose from associations like the Hardwood Association as a pirate is different from a simple merchant and the Sherman law is not needed for their control. The common law and our criminal statutes afford us all the protection we need against criminal combinations, or if they do not, we can easily enact laws that wi'l protect us.

These criminal combinations have undoubtedly given trade associations a bad name, but the distinction between that type of monopoly and trade associations is definite, and easily made, so that there is no warrant for lumping the two together, and ca'ling them all monopolies, or stigmatizing them indiscriminately, as some of our keenest yelpers at the heels of business seem to take pleasure in doing.

The laws and public opinion based on misrepresentation and ignorant assumption, which condemn all co-operation among business men, are directly responsible for the success of piratical combinations. At least, some part of public opinion sympathizes with the efforts of honest business men to co-operate in the interest of business stability, and the piratical combinations, therefore, inevitably find increased opportunity to carry on their nefarious operations. Any attack made on them under a law which condemns honest business alike with dishonest methods is defended on the general ground of interference with economic law. As a matter of fact, these piratical combinations have no standing in morals, in economy, or anything else except perhaps among the mentally higher grades of criminals. They are usually almost entirely local in character, and are commonly found in the building trades. They are dominated by a few vicious men who use strong-arm methods to enforce their will, and are rarely sanctioned by even their own memberships, They have nothing in common with legitimate trade associations, and work by methods and under conditions that obtain nowhere else. Their organizers terrorize those they force into the combinations and even resort to murder if necessary. These organizers care nothing for economic law, efficiency, honest work for honest pay, or anything else but "getting the money." They "hog" most of the "swag" for themselves and are hated and feared by everybody who comes in contact with them. And they are able to do the things they do and be what they are mainly because of the bad laws which classify them with honest business men.

We believe that it is about time for legislators, prosecutors, courts, and volunteer aspirants for political prefer-

ment, to begin making distinctions between criminal and economically vicious combinations such as those we classify as piratical, and honest associations such as the Hardwood Association, and to begin using more common sense in the making of laws, in the interpreting of them, in the prosecution of offenders, and in the indiscriminate stigmatization of business and business men through misrepresentation to an admiring and applauding popular press.

These piratical combinations do not need "regulations"; in our opinion, they "need killing", and our criminal laws provide all the weapons necessary to the operation. Combinations which use piratical methods and strong-arm tactics, are the only forms of combination that can actually "fix prices". It is possible that a monopoly of the "good trust" type might succeed in fixing prices, but we seriously doubt if such a monopoly could "maintain" them under conditions of free operation of economic law, except, of course, when the fixed price was "reasonable." As we have said before there are two sides to a bargain, and the buyer must be willing and able to pay the fixed price before the seller can exact it. We have recently seen in connection with the immediate cause of "deflation" that the buyer has the power to break a market whenever he makes up his mind to it. Even "reasonable" prices can not stand with an attack of no-demand. Trade associations of the type of the Hardwood Association and others which exchange market information do not and were never designed to "fix" prices, and if the Sherman law were repealed tomorrow there would be no more danger of these associations entering into conspiracies for artificially maintaining prices than there is now. The plain truth is that no trade association which has refused to employ "strong arm" methods has ever succeeded in fixing prices even when it tried.

The famous "Gary dinners," which were so much discussed a few years ago in connection with price-fixing, resulted in nothing in that direction. With gobules of the "doch-an-doris" in which they had pledged their loyalty to the agreed-prices still clinging to their lips, the diners are said to have rushed to the telegraph offices to wire instructions to their sales managers immediately to cut prices. We do not believe this story literally, but it is a good story, and it illustrates the problem which always confronts price-fixers. The business situation of every party to a price-fixing agreement is not always equal; some have special problems, need ready cash, or their inventories are piling up, or they are under the necessity of keeping their wheels turning, and these are invariably forced by more vital considerations to break their word on prices. This has always been the result of attempts to fix prices by simple agreements, unenforced by strong-arm tactics, and always will be.

Arbitrary price-fixing is not demanded by economic considerations; it is uneconomic, artificial and opposed to the general welfare, whether it is practised by Governments or by combinations. Price stabilization, which results from the combined judgment of all factors in a market, is not only economic, it is common sense, and inevitable. This is the kind of price-fixing that results from the operation of trade associations like the Hardwood Association. As a matter of fact, we ought not to use the phrase "price-fixing" at all in this connection, but it is our purpose to make the situation as clear as we have the power to make it, and we feel that a better understanding can be reached by using phrases which are commonly used by those who know nothing about the distinctions between one trade association and another. The function of a modern "open-price" association is mainly that of a gatherer of the information necessary to the formation of a sound judgment of the position of the market with which it is concerned.

In a broad sense, there is no difference between the character of the information collected and disseminated by a trade association of the kind of which we are speaking, and which we mean when we speak of trade associations, and the character of information collected and disseminated in connection with stock, wheat and cotton markets and others in which the speculative interest is greater than in ordinary markets. If all trades maintained "futures" markets and there is no legal obstacle of which we know about to their doing so, they would apparently be free to do everything the decision in the Hardwood case now denies them the right to do. (A distinction, which can be met by full publicity for all information exchanged, was made between "exchanges" and trade associations in the Hardwood case, on the ground that the information furnished by "exchanges" was available to buyers and sellers in equal degree.)

The distinction referred to is given force by the purely gratuitous assumption that there is no "real competition" between members of a trade association. As a matter of fact, there is a very real and very effective competition and, in our opinion, the plan under which these associations are operated is correctly named, "The New Competition." The information these associations furnish in practice is made the basis of a decision to sell or not to sell. It is true, of course, that in default of full publicity, the buyer is, less well informed about the market position than a seller-member of a trade association, but ordinarily markets are "made" as much by the

necessities of the seller as by those of the buyer.

If the buyer is forced into the market, he must bid and if he is not forced into the market he can wait for the seller to move, and the seller will, of course, act on his necessities and his knowledge of the position of the market, and will automatically give the buyer the benefit of both his knowledge of the market and his necessities. That is the common sense and practical view of the probabilities.

In our opinion, there are no conceivable circumstances under which "regulation" by arbitrary price fixing by Governmental authority would be practical or in the interest of the public welfare. "Price fixing" is price fixing whether it is done by Governmental authority or by private interests, and its economic consequences cannot be escaped no matter by whom it is practised. If a modernized Sherman law is effected, it will be effected as a result of a better public understanding of the economic reasons for the change, and if the public can be brought to understand the economic reasons for freeing business from one set of hampering laws it can be relied on not to sanction the enactment of another and, perhaps, more vicious set of laws.

XV

The Mechanics of Price-Making

Volumes could be written on the subject of the mechanics of price making, and still leave much to be said; their inexorability alone could be stretched into endless treatment, but we refrain. We nevertheless hesitate to leave this subject, which after all embraces one of the most important points to be considered, in a discussion of this kind without attempting to drive home our contention that "profiteering" and "gouging" are not to be feared as permanent adjuncts of economic development under natural and reasonably free conditions.

Perhaps if we all could agree that the alleged advantages of "unrestricted competition" are non-existent outside of our minds, the difficulties of reaching an agreement upon the question of the desirability of economic stability, or approximate stability, would be lessened.

Latterly, we have come to describe differing market conditions by referring to one kind of market as a "buyer's market" and to another kind of market as a "seller's market." A seller's market is a market in which prices are "made" by the competitive bidding of the buyers, the description "seller's market" arising out of the observed fact that in such a market the seller can do as he pleases; in other words he "owns the market." In a "buyer's market" the situation is reversed and the prices are "made" by the competitive offers of the sellers.

A seller's market is a "bull market" and a buyer's market is a "bear market." All of the competition in a bull market is the competition between the buyers, the sellers sit back and wait for the buyers to bid.

The buyer is urged on to bid by his perhaps fancied notions that prices are going higher, and that he must cover his needs now. This phenomenon is generally understood in connection with speculative markets, and is described by the term "psychological." The speculative element is a factor in all markets, and perhaps always will be, but its evil effects can be minimized through the encouragement of business practices which tend to stability.

In a bear, or buyer's market, all the competition is between the sellers, and at the extreme it develops into a "panic." The seller is urged to sell by his fears that prices are going lower, and that he will be caught with large stocks of goods acquired or produced at costs too high to return a profit if prices go down before he can sell. Or, if he is a heavy borrower against goods on hand his bank becomes alarmed, and forces him to sell.

What is the advantage of such competition? Theoretically when we speak of price competition we mean competition which is calculated to give the buyer the benefit of the rivalry between two or more sellers. Practically, we realize that the conditions of rivalry rarely exist in a form which makes the theory operative. There are rivalries which result in limited competition in some trades, and it is possible that the theory of competition at one time covered the practice, but the price we pay in other ways for the limited competition we get today is too great, and we are not interested in conditions that no longer exist.

The history of "business cycles" in this country shows that "booms" usually last longer than "depressions." And that means, of course, that most of the time our markets are "sellers' markets" and are therefore markets in which the competition is between buyers. We have had some fairly long periods of depression, and it might even be contended that periods of depression last quite as long as boom periods, and that therefore "sellers' competition" is effective for as long periods as "buyers' competition." In that case we would say that it is quite as important for a buyer to have the wherewithal to buy as it is for him to be able to buy on a competitive basis.

It is apparent that the only point that can be made against practices which tend to stability is that they might eliminate depressions, and deprive the buyer of his opportunity to buy goods under highly competitive conditions.

Trade associations operating under free charters would not eliminate competition in periods of slack business, if such periods could occur under "stabilized" conditions. All that the business practices of a trade association tend to do is to reduce the "swing." The information collected and distributed by these associations keeps their membership informed as to the costs of production in the industry, the stocks on hand, the rate of production, capacity, and the extent of the demand. "Overproduction" which commonly happens in boom periods is the result of the reckless efforts of producers to "hog" the market by getting to it first with all the goods they can carry would disappear.

Under so-called competitive conditions each producer is sufficient unto himself; he does not know and apparently does not care what the other fellow is doing, and does not attempt to foresee or estimate the point of saturation of his market.

Overproduction results in a panic and underproduction results in a boom, the demand for goods being greater than the supply an advance in prices inevitably follows. Trade associations operate to correct the evil of underproduction in the same way that they operate to pre-

vent overproduction. The information supplied trade association members indicates when production should be increased quite as definitely as it indicates when production should be decreased.

These results from trade association operations granted, it is evident that nothing in the way of "profiteering" or "gouging" is left to be feared except in case the members of the associations use their opportunities arbitrarily to fix prices. But we have shown elsewhere that all efforts to enforce "agreed prices" have failed except where conditions permitted the use of strong-arm methods.

The courts have taken the view that "social coercion" results from the frequent meetings which trade associations hold, but this view is directly contradicted by the experience in connection with the "Gary dinners" and indeed by all the experience that has been accumulated in connection with similar attempts to "agree" upon prices. These meetings have resulted in "understandings" but the understandings are understandings of the actual trade conditions and of the economic laws which grow out of and control these conditions.

Members of the same trade have come to regard one another as human beings, and much of the old bitterness, rivalries and feuds have been eliminated, but understandings like these are needed not only in trades but among us all, and they do not in the least affect the mechanics of price-making.

A trader or producer who knows his costs, his necessities and his market does not need to be coerced into using common sense in his business. If necessity forces him into making sacrifices nobody can stop him and nobody tries to stop him.

The "open price" associations lay all the facts before their members and perhaps even go to the extent of giving them expert advice, but that is all they attempt to do, not because they are perhaps too pub'ic spirited to connive at agreed prices, but because they know from their own, or the experience of others, that it is useless to attempt to agree upon prices.

They believe that trade association operations tend to stabilize prices, but they know that they can not reduce all of the factors which go to make prices to a formula, and they do not attempt it. Attempts to establish arbitrary cost standards have been just as unsuccessful as attempts to agree upon prices for the reason that in effect they come to the same thing.

Looking at the probabilities from the standpoint of the buyer, and leaving the general advantages of stability out of the reckoning, it is almost a certainty that the buyer will reap more direct profit from the operations of trade associations than he reaps from the alleged competitive system under which we now theoretically operate. Freed to operate in conformity with natural law the trade associations would nevertheless always be conscious that they were on probation, and in abnormal times they would, if they were dominated by reasonable men, put the brakes on themselves in the interest of the preservation of their freedom.

After the experience of the last few years a bare threat of "regulation" would be enough to bring the most viciously inclined into line. The probabilities, therefore, favor the contention that trade associations would in practice protect the buyer against himself.

XVI

The Buyer Versus the Seller

There are two sides to every question, and two sides to every bargain. Most of our laws in control and restriction of trade are made in the interest of the buyer—the seller is the universal villain. Yet the seller has his grievances too. As a people, we probably suffer most as sellers when we come to deal with organized foreign buyers. We have the Webb law, with a Sherman law string attached to it, for the protection of our interests in dealing with organized foreign buying, but we make very little use of it, although we doubtless make all the use of it that is possible in view of the string.

In trade most buyers later become sellers. The consumer is, of course, always a buyer, and that is the reason we favor the buyer in most of our laws. But is is a singular fact that the consumer seldom enjoys the protection of the laws mostly made for his benefit. The buyer-seller is the winner under the law. He uses the laws made for the protection of the consumer while he is buying and breaks them without compunction when he is selling. Here again the gods laugh over our efforts to circumvent the ingenuity and resource of the human mind by making rules.

The Webb law is not functioning in accordance with expectations so far as the protection of our home markets against organized foreign buyers is concerned, mainly for the reason that it is difficult to distinguish a foreign buyer or his agent from any other buyer.

That of course if not the only reason, but it is one of the reasons. Germany devised an ingenious scheme for getting ahead of her competitors in foreign trade which turned on her ability to keep the gold value of the mark in Germany above its value in the money markets of the world.

Outsiders found they could get more for a mark in Germany than they could get outside, and took their marks to Germany to spend them. Germany met the situation by exacting a tax on German products exported by foreigners. Two ways of defeating these devices were developed; the owners of marks who had nothing else to do moved into Germany where they could do their spending as a resident, and exporters hired German agents to send goods purchased with the cheaper marks out to them. There never was a puzzle that somebody couldn't work. What is done by one mind can be undone by another.

You've got to have a moral basis for ules and regulations and law. Men ust believe in the rightness and justness of a law before they will observe it.

Foreigners have great fun getting around our "silly' laws and are especially pleased when we hog-tie our own traders for their benefit. What could please a foreign competitor more than the disorganization of our industries through restrictive laws? We can't depend on our tariffs for protection forever. We've got to get something back for what we have given and are giving the world. The world can't pay us with gold; we've got it all, or nearly all. It can't pay us with "securities" unless we are silly enough to go on accepting vague promises to pay in lieu of something tangible in return for what we give. The ownership of securities carries the right to demand interest; the more securities we buy the more interest they will owe us. How are they to pay us if not with goods sent into our markets to compete with our own industries? We've got to loan more money to put them on their feet, but we'll want it back some time, and when we want it hard enough our tariff walls will crumble.

That means that our own industries must be made efficient. We used to beat the world in foreign trade through quantity production, but the world has learned that trick, too, and in the future success in competition will turn on costs, and if we are going to reduce costs and maintain our standard of living we must eliminate waste.

Waste can be eliminated only through co-operation. Successful co-operation cannot be attained under the restraints of an antiquated system of law, or the direction of bureaucrats. If the bureaucrats had the minds to run the business of the country, they wouldn't be bureaucrats, they'd be running it. We have no illusions about either the moral or mental status of the average business man, nor have we any illusions with respect to the rectitude or competency of bureaucrats. But we have a high opinion of the ability of American business as a whole, and believe that ability will find its fullest expression in co-operation.

We need co-operation for what is to come as well as for what is at hand. Our home markets must be protected to the greatest possible extent, and they must be protectetd against organized selling. Our tariff laws will protect us against the latter danger for a while, but as we have said some day the tariff wall will be thrown down, and if we are not prepared, American industry will be dealt a hard blow.

If there is any suggestion in what

we have said which leads you to believe that we feel that anybody is deliberately seeking to cripple industry through forcing it into disorganization, it is not intended. Outsiders have found that they do not need to intervene in our affairs in order to have us step on our own feet. They know we'll do it anyway, and don't bother. You'd think we would have learned to know better in all the time that we have been experimenting with our vital interests, but we haven't and most of our competitors know it.

We don't even know what our vital interests are, or most of us don't. We spend so much time trying to "get ours," that we have no time to pay any attention to the dwindling pile, out of which the division is to be made. We want to see all this changed. See the imaginary class interests melted into the general interest, and the activities of the hate-makers turned into building up confidence by making good by thinking good.

We believe that our business laws, anti-trust laws and restrictions are opposed to the best interest of all the people, no matter from what angle they are considered. In preceding discussions we have tried to point out some of the obstructions they offer to progress, and have given you some of the views of leading thinkers as to what the recent decision of the Supreme Court in the Hardwood case meant in connection with stifling the growing movement in the interest of progress of the trade associations. These articles are intended to set you thinking about the real interest of the country, and, if possible, to arouse you to action in behalf of the revision of the laws which are now hampering and threaten to still further hamper the natural development of the economic system under which we live. That system works pragmatically, and its end cannot be foreseen, but the tendencies which are plain are all in the direction of the general good. There is only one way to find out what our economic system will develop and that is to free it to develop in accordance with its own laws, and quit trying to make it better by statute law.

We favor the fullest possible freedom for business on the theory that business knows more about business than the rest of us.

XVII

Oppressive Statutes Bring All Law Into Disrepute

Alarmed at the growing leniency of juries in criminal cases, three New York judges recently discussed the jury system in terms which suggest that they were ready to advocate its abandonment. The implied willingness of these judges to junk this dearly bought and most cherished arm of our system of justice is a natural result of the attempt to establish our government upon the basis of individual and group moral concepts turned into law by means of the statute.

Prohibition has been charged with the responsibility for the recently observed unwillingness of juries to convict criminals. That, in our opinion, is a hasty conclusion, drawn from our readiness to attribute causes to the most immediately prominent possible source. Our leniency to criminals, our disrespect for the law as made and provided, is a growth developed by years of continued encroachment upon the rights of the individual.

When jury panels include business men who are, perhaps, called from the Grand Jury room where they have just been undergoing "investigation" as conspirators in restraint of trade or under a charge of refusing to sell goods to persons whom they suspect intend to use the goods against their interest, and also against the interest of the public, it is natural that they should feel some sympathy for a fellow lawbreaker even if the man they are asked to judge is charged with the most serious of crimes. When everybody is under the suspicion of the law, differences in degrees of crime are likely to be overlooked.

And business men who have been schooled and drilled in technical ways of defeating the laws to which they are subject are also likely to take a sporting interest in the technical skill of a lawyer defending a highwayman and let his client off when it appears to them that the lawyer has successfully met the merely legal necessities of the situation. Thus, the juror, who is supposed to apply the facts to the law as laid down by the presiding judge, unconsciously draws upon his own store of legal knowledge and gives the defendant the benefit of all his technical defenses, even when he is morally certain that the man is guilty. The law becomes something to be defeated, is a common enemy and what is more, the technicalities of the law become more important in the mind of the average man than the law or the purposes of the law.

This view of the law as it is held by business men is the product of a system which undertakes to check, hamper and restrain men in fields in which no moral foundation has been laid. Every law which is without a foundation in generally accepted morals not only will not be obeyed, but its evasions will tend to undermine the laws which are founded on the primary rights of society to protect itself against the vicious, unsocial, and innately criminal. As the New York judges have suggested, this tendency can be corrected by the abandonment of the jury system, so that the law-makers, the judges and zealots may have complete freedom, in sending all the rest of us to jail whenever we displease them, and there isn't much choice between that system and a system which tends to general disrespect for law, and anarchy.

Outside of the ranks of the class upon which we theoretically draw for our juries, disrespect for law and sympathy with criminals is based on the popular belief, fostered by investigating committees, zealous and politically keen prosecutors and publicity-loving bureaucrats, that "everybody is crooked," especially "Wall Street" and "big business." Holding this opinion, which was formed in the "trust-busting" period of our economic development and, which, partly, at least, was justly come to from the disclosures then made, the rank and file of jurors are inclined to let the "little fellows" off. Formerly they tempered their sympathy to the degree of the crime, but latterly they are becoming more liberal, and there is no telling how it will all end unless we use our minds in an effort to get at the seat of the trouble.

Investigating committees, grand jury investigations and the like always proceed with a great fanfare to uncover the derelictions of those who have found new ways to circumvent bad laws. They never question the sound policy of the law or seek reform through studying the nature of the alleged evil to see if it is an evil; a reputation for industry in the prosecution of "men higher up" whom somehow they never reach, is more valuable as a political asset than a reputation for zeal in the discovery of error in so impersonal a thing as the law. A law like the anti-trust law, or the prohibition law, is likely to have supporters of a very positive type, while malefactors of great wealth are friendless and, therefore, safe and fair game for anybody with a future to look after.

Investigations also have a tendency

to develop away from the subject to which they are directed. The Lockwood Committee, for example, investigated nearly everything but the houseing situation, or at least the shafts of its wrath were directed away from the house-owners and towards "combinations." We need hardly explain that we are not attempting to defend the illegal practices which the investigation disclosed. Our complaint against the Lockwood Committee, and its activities is that it has made no effort to stamp out the source of the evils, nor shown any comprehension at all of the fact that it is the law that is wrong. And also because in effect it has been used to obscure the underlying question of rent profiteering. The corporations, which make up the combinations complained of, are mostly satisfied when they can make 4 to 6 per cent in hazardous business operations, and an investigation into rent profits which results in the courts interpreting the laws recommended by the investigators so as to allow house owners 8 to 10 per cent on the value of their properties cannot by comparison be considered a success.

In the main, the evils disclosed by the investigation are the direct result of an oppressive system of law. The kind of graft disclosed could never have been exacted under a system which permitted employers to cooperate in defense of themselves and the public. Blackmailers must have "something on" their victims before they can operate successfully, and that is the explanation of Brindell and his type of labor leader. Most of the associations believed themselves to be operating in defiance of the law, and they were, therefore, the more open to suggestions that they might as well be hanged for a sheep as a goat. And, also, of course, they were naturally averse to publicity and "trouble."

Operating in the open, with a clear conscience they would have never submitted to the things they did submit to, and would have never entered into the agreements they did enter into. The laws that were violated were mainly criminal laws rooted in our system, and the crimes that were committed are punishable under those laws and have always been. The so called reforms that have been effected are largely imaginery.

Yet a great pother is made over the relations of the Sherman law to such conditions as these. The Sherman law is no more necessary for the punishment of such crimes than it is for the punishment of murder. Our basic criminal laws meet all of the demands such conditions as these make upon them. Blackmail, boycotts, blacklists, and all criminal conspiracies are and have always been covered by the law in some form or other. The fact that these laws have been violated is no more surprising than the fact that our laws against burglary and theft are violated every day. But we have crippled our machinery for detecting and punishing the violation of these laws by making the men engaged in following the natural trend of economic development fellow-criminals with burglars, conspirators, blackmailers and thieves.

We have no desire to disparage or unduly criticise the work of anybody who is honestly, though perhaps misguidedly, engaged in an attempt to solve some of the difficult problems before us. But we think the time for investigations into law violation by legislative and congressional committees has passed. The regular prosecuting machinery of the country is able and more than willing to do all and more than is needed in that direction. Believing this, we would hope that if the Lockwood Committee must continue its investigations into "combinations in restraint of trade" it will devote some of its time to investigating the question of the public policy of restrictive laws, and their effects upon the morals, economy and happiness of the people.

Mr. Samuel Untermyer, counsel for the committee, has tentatively, we believe, suggested a system of legalized combinations in restraint of trade that would put any spontaneous combination that we ever heard of to shame. Mr. Untermyer's plan, if it is a plan, would also plunge us straightway into socialism, or a bureaucracy closely akin to it. The New York Call, which is published in the interest of the Socialist party, says that what the world needs is Socialism, and it apparently has the idea that the repeal of the Sherman law will help the world to get Socialism.

If the Call believes that the repeal of the Sherman law will remove an obstruction in the way of the coming of the socialistic state, we think it in error. In our opinion, the Call ought to fight as hard as it knows how to keep the Sherman law and all the little Shermans on the statute books. The Sherman law is a trust breeder, and the socialistic stage will have much less trouble taking over a few big corporations whenever the Call persuades us to adopt socialism than it would have in taking over a multitude of independent concerns operating together in the interest of economic development and one another. Mr. Untermyer is much closer to an agreement with the Call than we are, as what we want is not more government in business but less government in business. In short, we want fewer laws, fewer new ones and fewer old ones. And we are particularly anxious to get rid of the laws that make criminals of us all, and which threaten to undermine our entire system of protective law.

XVIII

Exemption for Farmers Violates Law Equality

As alarming as is the jury system undermining effects of the Sherman and other laws which are not in harmony with progress and the genius of the people, the threat against the principle of "equality before the law," the keystone of democratic government, is more alarming still to those who are concerned with preserving the fundamentals of our political system. "Exemption laws," such as the farmers' co-operative law, which was recently enacted in response to the demand of the farmers for relief from the restrictions of the Sherman law, are opposed in every sense to the first principles of justice, and can only lead us into self-destruction.

The framers of the fourteenth amendment to the Constitution, the organic law of the land, with the destructive effects of favoritism, preferences, and privileges, fresh in their minds, sought to forever safeguard our country against the evils of "class legislation" by putting a clause into the Constitution which expressly guarantees "the equal protection of the laws."

Our courts have modified this provision in the Constitution to some extent through interpretation, but they have recently shown an inclination to retrace some of their steps in interpreting the Constitutional provision which covers class legislation, and we do not believe for an instant that the farmer's exemption law will be allowed to stand, although, aside from the injustice of allowing one class of citizens to do what is denied to others, the purpose of the exemption law is good, and in the economic interest of the whole people. Any law that tends to restore and maintain the equilibrium of production in any field is in our opinion a good law. But we must preserve "equality before the law, even at the cost of economic efficiency."

The courts, it is true, have evolved a rule of interpretation in "class legislation" cases which gives the farmer some ground for hope that his exemption law will be held constitutional, but that rule has been badly overworked, and certainly if ever there was a case of class legislation under the common acceptance of the term the law exempting farmers' combinations from the Sherman law is it.

The rule of interpretation in connection with so-called class legislation is really a rule against discrimination within classes. If substantially all of the persons falling within an easily defined and justifiable class are treated alike the courts are likely to find that there is no violation of the constitution. Frankly, the rule confuses us; but we are certain that even that rule can not be made to apply to a set of producers and sellers merely because they are usually known and described as farmers.

If we classify farmers under the general economic head to which they belong they fall into the general economic class of producers and sellers. The "farmer" classification is merely a sub-classification which is analogous to "manufacturer." As a matter of fact the farmer is a manufacturer, notwithstanding the special close-to-nature status we have romantically given him. His product is as much the fruit of his operations as the manufacturer's product is the fruit of his operations.

We regard the product of the manufacturer as an "artificial" something contrived outside of the course of nature, but the cave man who waited for unassisted nature to produce his nuts and his wheat would have considered the modern farmer as much a manufacturer as a maker of automobiles or anything else. Certainly, the analogy is complete between a farmer who "makes" his land, fertilizes it, and develops productivity where none existed and a maker of artificial ice who merely uses a more complicated method in bringing the natural laws of productivity into operation.

The tendency to divide the country into arbitrary political classes rather than to foster solidarity of economic interest which at bottom cements the country in an indivisable unit, must be overcome if we are to meet our problems intelligently and in the interest of the public welfare. Numerically, the persons dependent on farm activities for a livehood and those dependent on trade and industry are about equal, the number engaged in urban pursuits being somewhat greater

The money value of the products of the factory and the farm was almost exactly equal during the last three years for which the figures are available. In other words, during those three years the farm-factories and the steam factories returned their proprietors and operatives practically the same compensation, the farm interests getting slightly the better of it.

The superior organization and busi-

ness foresight of the steam-manufacturer enabled him to safeguard his interests more effectively during the readjustment period than was possible for the farm-manufacturer operating under archaic notions of finance and economy, but instead of attributing the farmer's troubles to his faulty economy, the politicians have been making capital for themselves by calling harsh names and reverting to the old cry against "Wall Street" and the "interests." Wall Street is today possibly the most politically powerless and helpless "interest" the country ever knew. And at the same time "Wall Street" is probably doing more constructive thinking than is being done anywhere, the United States Senate not excepted.

Harsh things are easily said. There is all the room in the world for satirical and downright abusive writing about some of the elements in our political life. But we have no desire to stir up animosities, or increase the want of understanding which already divides the country. We feel that some of the men who are widening the breach between the artifically made classes of our country honestly believe that they are working in the interest of the public, and know that they would be deeply offended if we should undertake to catalog the personal benefits they derive from keeping old grievances and bad feelings alive.

These same men quick as they are to ascribe bad motives to others would hotly resent any questioning of their own motives, and they would certainly resent the drawing of inferences such as they daily indulge in to the satisfaction of themselves and their constituents.

We feel that the interest of the country can be best served by a smoothing over of past differences, and by attempts to reach those "understandings" of which President Harding spoke early in his administration. But with all that we are not inclined to be "mealy-mouthed" or overconsiderate of the feelings or resentments of those who deliberately and with malice aforethought stand in the way of progress or who undertake to raise their puny tenors into the volume of the voice of the people.

Ignorance which refuses to seek enlightenment is just as destructive as self-interest parading in the garments of the tribunes, and we have no paatience with either.

XIX

Other Aspects of the Sherman Law

In its efforts to maintain the "public policy," which, it holds, the Sherman law and its interpretations have set up, the Supreme Court in the Beech-Nut case has opened a new field of uncertainty and "twilight zones" for the adventuresome manufacturer and dealers in advertised specialties.

The case involved the right of "refusal to sell" to dealers, jobbers and retailers who refused or failed to maintain "resale prices" fixed or suggested by the Beech-Nut Co. And also the right of the company to engage in practices intended to reveal to it failures on the part of its direct customers to observe the prices so fixed or suggested.

The court held, in accordance with the principle laid down in the Colgate case, which involved the right of "refusal to sell" only, that the Beech-Nut Co. had the "undoubted right" to refuse to sell traders who refused to observe its "resale" prices, but, in effect, said that the company could do nothing by way of keeping itself advised as to failures to observe the "resale" prices, either through co-operation with trusted dealers, the employment of agents or salesmen to assist it in discovering "price-cutters," the operation of a system of code marks or symbols, which facilitated the tracing of goods found in hands of price-cutters back to dealers, or through keeping records of dealers to whom no sales were to be made until they had given assurances that they would observe the resale price fixed by the company.

In other words, a manufacturer or dealer has an "undoubted right" to refuse to sell to those who refuse to observe stipulated resale prices, but he must not do anything, especially any of the things specifically named in the decree, to make his right effective.

There is ground in the decision for the opinion that the court went even further and practically nullified the rule laid down in the Colgate case upholding the right of refusal to sell. And if the court did not also actually set up the proposition that a single corporation or person operating through agents can engage in a "conspiracy in restraint of trade," it came so near doing so that it left some doubt on the question, even after the line of reasoning is hooked up with "co-operation" between the company and its dealers. The court said of the "Beech-Nut Plan," of which it can be said that it was not necessarily dependent upon the co-operation of dealers: "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade. . . . In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Co. to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted by it. Furthermore, he is enrolled upon a list known as 'undesirable' price cutters." Nor, says the court, is the inference of restraint of trade overcome by the stipulation in the record that no contract was entered into.

The case went to the Supreme Court on a writ of certiorari arising out of an order made by the Federal Trade Commission on the Beech-Nut Co. to "cease and desist" from operating the "Beech-Nut Plan" on the ground that the plan was in violation of the "unfair competition" section of the Trade Commission Act. The order was made in the face of the fact that the commission has indorsed or is sponsoring a bill now pending in Congress, which seeks to legalize and control the fixing of "resale prices." The only allegation of "unfair competition" in the complaint was contained in the charge that the plan was being operated for the purpose of enlisting the co-operation and support of the various trade interests "in enlarging the sale of respondent's products to the prejudice of competitors who do not require and enforce the maintenance of resale prices." Apparently we are now getting along to the place where it is unlawful for those offering goods for sale either to offer them on a more attractive basis than the same goods are offered by competitiors, or to offer them on the same basis as competitors.

Mr. Justice Holmes who dissented and delivered an opinion in which Mr. Justices McKenna and Brandeis concurred, in discussing the right to refuse to sell under the law, said: "I see no wrong in so doing, and if I did, I should not think it a wrong within the possible scope of the word 'unfair.'"

There was no charge that the prices fixed were excessive or "unreasonable" although of course the commission is as yet without the power to fix prices, nor any clear basis for action under the Sherman Law. As a matter of fact, the commission had some difficulty in fitting its facts to the law. The term "unfair methods of competition," as set out in the Trade Commission act, had never been defined by the court, and the Beech-Nut case was the first case in

which the majority of the court affirmatively tied the term "unfair competition" to the Sherman Law. In the case of the Federal Trade Commission against Gratz, the court negatively hooked "unfair competition" to "public policy," which it has read into the Sherman Law. It also, in that case, partly defined "unfair competition" in the negative as applicable to practices carrying deception, bad faith, fraud or oppression and opposed to good morals. But until it reached the Beech-Nut case the court had never found it necessary to affirmatively define the meaning of "unfair competition."

In view of the inquisitorial powers of the Trade Commission, the lugging in of "unfair" into the principle of "public policy" to a place alongside "restriction of competition" is an alarming development of the law. It is contended that the Beech-Nut decision has resulted in no important change in the law covering the right of refusal to sell as laid down under the Sherman Act in the Colgate and other cases, but whether that is so or not, the case is most significant in its revelation of a determination on the part of a majority of the court to adhere to a "public policy" which has at least lost the complete allegiance of legislators, as is plainly shown in the enactment of laws exempting classes of producers from the requirement to maintain "unrestricted competition" and refrain from co-operation.

As a result of the decision, the manufacturers and dealers who have been engaged in practices similar to those condemned by the Court, are scrapping the elaborate machinery formerly used to make their admitted right to refuse to sell effective, and are trying to reorient themselves to the law, which, of course, means more waste without any practical result even to the conception of the law which has forced the step. In other words, the old farce of running rings around a silly law is on again. Surely it is reasonable to hope that the day is not far distant when we shall "cease and desist" from sacrificing business order and organization upon an altar for which there is no longer any reverence anywhere except in the temple itself.

The claim that the Sherman Law never sets out to do a pious thing without stepping on its own feet is again sustained in this case. There is apparently no moral or legal question about the right of the owner of goods to refuse to sell for any or no reason. Yet, the Trade Commission hailed the Beech-Nut Co. into court in the face of its own endorsement of a bill designed to legalize the enforcement of resale prices, and in the face of the undoubted economic soundness of the principle in the interest of better quality in goods, solely, in our opinion, for the consequent benefit of the interests which are seeking monopoly of markets by means of depriving the public of the opportunity to exercise choice in the selection of goods. Practice shows that the "good-will value" of advertised products is used mainly as a bait to attract buyers to patronize distributors who rely on incidental sales of their own "brands" for the recovery of losses sustained as a result of dealing in advertised goods without profit.

In upholding the right of refusal to sell, the court itself recognized the undoubted property right in "good-will," as well as the right of an owner to exercise control over his own property and acts, but it is evident that it had some difficulty in reconciling these rights with "public policy." And it altogether ignored or refused to admit the contention that restrictions of the right of the Beech-Nut Co. to refuse to sell would result in aiding and abetting the attainment of monopoly by other interests. There is no escaping the conclusion that a system of law which produces such results needs radical and immediate revision.

XX

Increased Power of Trade Commission

As a result of the decision in the Beech-Nut case, which, in effect, ties the "public policy" conception of the Sherman act developed by "judge-made" law to the "unfair competition" provisions of the Federal Trade Commission act, the power of the terrorists, who have turned the traditional bold and fearless American business man into a timid, faint-hearted sycophant, has been extended beyond the limits of estimation.

The coercive force of a mere threat to prosecute or sue under the Sherman law under conditions which afforded the prosecutors no special facilities for investigation is fully and fearfully illustrated in the long list of "consent decrees" which have practically been forced down the throats of the financially helpless and legally ignorant in the great war which ambitious and even conscientious prosecutors have waged upon business. What, then, are we to expect from prosecutors who have the combined power of inquisition, prosecution and to some extent of rendering judgment?

The obvious answer to an objection to the coupling up of inquisition, prosecution and judgment is, if there is nothing to hide, there is nothing to fear. And the answer to the answer is that nobody knows whether there is anything to hide or not. If as a unit the Supreme Court itself has never been able to agree on what the law is in Sherman law cases, how are business men or their lawyers to determine what it is?

Try to picture what will happen under the new system. The inquisitor-prosecutor after going over every detail of a business with a fine tooth comb will say: "This, or that is in violation of the law." Whereupon the already indicted concern will rush to its lawyer and ask: "Is this or that legal?" And what will the lawyer say? Why, that he thinks that maybe it is, that in such and such case the court held, etc., but he can not be sure. "How much wi'l it cost to fight it?" asks the concern. And the lawyer says, "Well, that's hard to tell." At this point the inquisitor-prosecutor steps in and says, "You'd better let us fix you up a nice 'consent decree' enjoining you from doing this thing in that way. It'll cost you a lot of money if you don't, to say nothing of a lot of damaging publicity and we might even send you to jail." Any business man with the sense he was born with would say, "All right, go ahead and fix up your decree." It might happen, as we know that it did happen in one case, under the current system of prosecution, that the business man would call the inquisitor-prosecutor's bluff, and say, "prosecute and be damned," and being just as uncertain of his ground as the business man, and perhaps upset by that "defiance" which Mr. Untermyer says is reprehensible and contrary to his notions of the humility demanded by his traditional ideas of subservience—the inquisitor-prosecutor would perhaps get off his "high horse," just as the prosecutor to whom we referred got off his. Unfortunately, however, it is on'y occassionally that prosecutors run into "defiant men."

"Consent decrees" usually set out in detail a long list of things that the concern brought into court agrees not to do. It may be that some of the things the concern agrees not to do are perfectly legal, and common'y done in its trade. Decrees have certainly been entered which inhibit concerns from engaging in practices which have not been clearly defined as illegal and which their competitors engage in every day as a matter of course. The decrees are usually intended to cover the "sales" or other "plans" under which the accused concern has built up its business.

"Consent decrees," like final decrees entered after trial and conviction, therefore, usually force the enjoined concern to adopt some other plan, and that means that they merely result in the destruction of business order and organization, and waste.

The Beech-Nut decision offers new possibi'ities for prosecutors and bureaucrats in their often fanatical crusade against business. Formerly they were hampered by the delays incident to collecting the evidence for the "making of a case" and found it difficult to get around to look substitute plans over until they had been well established and operative for a long time. All that is now changed, apparently, or will be if the Federal Trade Commission elects to become a business destroyer instead of the business builder which it was originally intended to be. If it so elects, and can command money enough, the Trade Commission is now in position to maintain constant supervision over not only "unfair competition," but over co-operative organizations and "trusts" as well, and as a result of its increased ability to exercise coercion it will perhaps succeed in so plastering "new plans" with "consent decrees" that business will shortly be unable to move hand or foot in the direction of co-operative effort and will be forced back into the old competitive conditions which wasted the wealth of the country

so recklessly, and which fostered the "trusts."

The power of the "terrorists" over little business men even under the current system of prosecution is astounding in a country which is dedicated to political and economic freedom. As a rule when a prosecutor pounces down on them the "little fellows" give up without a struggle; the possible expense and penalties appalls them. Even if they have good counsel, which they usually do not, they tremble before the face of the law and agree to anything. Most of them, we must admit, appear to deserve everything they get, and more, but such a judgment is arrived at from a consideration of the superficial facts only.

The underlying motive of those who engage in practices which the law forbids is not so much a desire for undue profit as it is the urge to fulfil the economic law which makes efficiency the price of survival. Co-operative effort for the elimination of waste and the attainment of individual and group efficiency is demanded not only by the law of progress, but also by actual competitive conditions in the world with which American industry must contend.

We have used and we admit a liking for the statement that economic law can not be set aside by the statute or rule, but in view of the increased powers of the Federal Trade Commission under the Beech-Nut decision we are forced to confess doubt. What we meant when we made the statement was that if possible business would evade and nullify every law that could be made in connection with an attempt to prevent its development in accordance with the laws of its own being. A tree will grow around a rock and even carry it up in its arms in the process of growth, but a plant which is enclosed in a steel box will not grow. With the law what it is and the powers of the Federal Trade Commission what they seem to be under the Beech-Nut decision, the repressive forces are stronger than the constructive forces, and if the powers of the Trade Commission are made effective and it elects to use them oppressively, there is no question about which will be the victor in the struggle between the statutes and the economic law. The inquisitors of the older days succeeded in repressing the growth of science for nobody knows how many years, and it is entirely possible that the economic dogmacists who deny the possibility of truth or righteousness in a system which contradicts all their ideas of what a system ought to be, will have their way: also that is, of course, unless we upset the elaborate controls they have and are perfecting by knocking the law out from under them.

XXI

Ignorant Critics Hamper Progress

Intelligent action in the interest of freeing the economic forces at work toward improving the general welfare will never be had in this country until those who claim to speak with the voice of the people give some study to the things they attack.

"Trying lawsuits in the newspapers" was always a favorite method with those who had a weak case to present to a court. The method is a familiar one with agitators of all kinds, and with those who seek a quick way to public favor by utilizing old prejudices. Fault finding is the easiest mental exercise there is. The builder does not tear down until he is ready to build up, the public man or citizen who is unselfishly and intelligently interested in the welfare of us all does not begin his ministrations by adding to dissension.

After we reach a certain age and arrivals range all the way from infancy to senility, some of us lose the flexibility of mind which is required to keep up with the times. Ideas freeze, take up positions in our minds from which it is impossible to dislodge them, and render us incapable of free thought in connection with new things. Every age in the life of man has shown that. The new things, new inventions, new religions, everything new has always been resisted by this type of mind.

Perhaps new things always will be resisted, but general knowledge has now advanced to the point at which this handicap to continued leadership is easily detected by a responsible citizenship, and is no longer so potent in dragging progress back as it was. Minds which deal in generalities for long periods of time seem to freeze sooner than others. But we will not undertake to analyze, it is enough for our purpose if we simply indicate this phenomonem.

Popular prejudices are the stock in trade of politicians, but we are not here concerned with politicians. Our interest is for the moment centered upon the activities of those who so far as we know have no political aspirations. Men who are apparently acting in a crusading spirit, without selfish purpose of any sort.

Mr. Samuel Untermyer is perhaps entitled to a place among these latter, although it would be easy to ascribe self interest to Mr. Untermyer if we were disposed to use the methods he uses in his attacks upon those whose acts he considers detrimental to the public. And may we not say without ill feeling of any sort that we regard Mr. Untermyer's activities as more prejudicial to the real welfare of the people of this country than those of any individual we know about. But we do not charge him with any ulterior motive, despite the opportunities for doing so which exist in his record and which could be made from deductions in accordance with the method he employs.

If we were as reckless as Mr. Untermyer, for example, we might say that, inasmuch as only foreign interests are to be benefitted by the disorganization of our industry which he advocates, and as he has been in the public eye more than once in connection with alleged foreign affiliations, he must be acting in the interest of foreign trade rivals of this country. Obviously, such a charge is not warranted by what we all know of Mr. Untermyer's character, and his standing as a citizen of this country. But it could be made and supported with just as much force as the charges which Mr. Untermyer brings against our business men.

Mr. Untermyer is reputed to be one of the largest stockholders of the most important rival of the United States Steel Corporation. On that ground, in connection with recent statements, it would be possible to charge Mr. Untermyer with a desire to injure the United States Steel Corporation in the interest of the company in which he is a large stockholder, but we know that he had no such purpose, and believe that he would attack the company in which he is heavily interested just as readily if he felt that that company was acting in a manner prejudicial to the public interest. Or we might say that Mr. Untermyer having accumulated many millions in the course of a lifetime of successful lawyering in this country now aspires to cap his career with some political distinction or other, but we do not even believe that to be his motive.

In fact we believe that Mr. Untermyer's sole motive is a desire to remedy what seems to him to be a bad situation. There are thousands of men, rich and poor, in this country who like Mr. Untermyer want to wipe out evils in the economic and political organizations. Some of them seek to carry out their reforms in methodical and intelligent manner, but the great majority are content to follow the method of general and reckless denunciation of anything and everything closely or remotely related to the thing under attack.

Mr. Untermyer, for example, in a recent attack upon trade organizations in this country launched his entire attack from the basis of generalities, and demonstrated to the satisfaction of any intelligent critic his total unfitness for leadership in any movement seeking

reform in this field. Mr. Untermyer has been an advocate so long that he is content when he makes a "point" and is not particular how he makes it, so long as it is effective.

In this attack upon trade associations, which was made before the Men's Club of the Temple Beth Elion, Sunday, April 23, Mr. Untermyer, in effect, charged that the United States Steel Corporation is fostering trade associations in the steel trade. Now that is an utterly ridiculous charge, assuming, of course, that the management of the United States Steel Corporation is in fact, as intelligent and efficient in the interest of the corporation as its success seems to prove. Every business man in the country whether he is at the head of a big corporation or a small firm appreciates the value of trade organization as a stabilizer of business, but it is to be doubted if any interest, even a "corporation with a soul," would go out of its way to encourage economic growths which tend to preserve and strengthen its competitors.

This charge by Mr. Untermyer is due, of course, to his assumption that there is in fact no competition between the United States Steel Corporation and the independent steel companies. That assumption could not have been made if Mr. Untermyer had any actual knowledge of the real competitive conditions in modern industry. His conception of the "competitive system" is the same as that which official Washington talks about, but does not act upon. In short, he believes that price competition, based on ignorant struggle for markets, can be reduced to a system.

Mr. Untermyer is unquestionably ignorant of economic processes and tendencies, but he is not always ignorant of concrete facts. That was proven by his willingness to leave his audience, on the occasion referred to, in a frame of mind to make deductions which it would not have made if Mr. Undermyer had given concrete details instead of generalities. What Mr. Untermyer said in that talk with reference to the effect of organization on prices, bordered closely on misrepresentation, but was apparently not unethical in the circles which concede anything to the advocate engaged in "making a point." Referring to steel prices, Mr. Untermyer, assuming that he was fully quoted in the press accounts, contented himself with the following, giving no figures in support of his charge. "These effects are best appreciated by comparison of the existing prices in all lines of steel production at the time of the organization of the Steel Corporation in their relation to the then cost of living as against the present cost of living." Now this statement unaccompanied by the comparison itself would lead the average man to but one conclusion, and that would be that the "purchasing power" of steel had greatly increased as a result of organization. As a matter of fact, as we have shown in the course of this discussion the purchasing power of steel in 1914 was exactly half what it was in 1900, the year of the organization of the United States Steel Corporation. That is, a ton of steel would buy just half as much in general commodities in 1914 as it would buy in 1900. The only study of the question of the effect of industrial organization upon the purchasing power of steel and other commodities of which we know is that of Drs. J. W. Jenks and Walter E. Clark, a revised edition of which was published in 1920 by Doubleday, Page & Co. That study brought the data up to 1914, with the result indicated above.

The Federal Reserve Bulletin for April gives the February, 1922, index price of steel billets on a basis of 1914 as 109, and steel plates as 94 and the "all commodity" index number as 151. Assuming that the data are roughly comparable with those used by Drs. Jenks and Clark, which covered seven prices, they would indicate that the purchasing power of steel in other commodities, which, as Mr. Untermyer correctly assumes, is the true method of testing the effect of industrial organization upon the general welfare, is now even less than it was in 1914.

Mr. Untermyer's distortion, or ignoring of these facts, whichever it was, is further proof that he is unfitted to pass judgment upon economic questions, and illustrates the point we made in the beginning to the effect that "Intelligent action in the interest of freeing economic forces at work toward improving the general welfare will never be made in this country until those who claim to speak with the voice of the people give some study to the things they attack."

XXII

Efforts Toward Solution of Immediate Problem

As a result of the practical failure of the effort to bring about a reconsideration of governmental policy toward industry in the light of modern economic tendencies four lines of action, none of which offers any promise of a permanent solution of the problem are being followed, they are:

First, Senator Edge and Representative McArthur have introduced a bill providing for some form of advisory supervision of industrial organization intended to guide trade associations around the reefs of the Sherman law, and, perhaps, give them immunity for acts approved in advance by the Federal Trade Commission, or some other commission.

Second: Following a suggestion made by Senator Walsh in a debate on the Edge resolution providing for an inquiry into the present economic situation in the United States, the expedition of the final consideration of the "Linseed case" now on appeal toward the Supreme Court is being urged. Senator Walsh is well supported in the opinion that the quickest way out for the trade associations lies through an early consideration by the Supreme Court of a case, which will bring the legality of a bare "plan" for trade association activities under review. While not ideal for this purpose, the Linseed case is considered as offering a fairer test of trade association activities on their merits than was offered by the Hardwood case.

Third: Some 60 trade associations, only a few of which operate under any of the various "plans" for stabilizing industry, are reporting production sales and price statistics to Secretary Hoover under the plan proposed by him at a meeting held in Washington on April 12. The number of co-operating associations is increasing daily, and acceptance of Secretary Hoover's plan by others is probable, following necessary action at forthcoming meetings by the individual associations, which have yet to consider the proposal.

Fourth: The great majority of trade associations are doing the best they can to adjust themselves to an unsatisfactory state of affairs. Some are abandoning the "open-price" plan, others are sticking to it on the theory that they have a legal right to do so until specifically enjoined, and some are simply "standing by." The "open-price" plan has been definitely abandoned by a number of industries, which owing to the nature and character of their business have found that they can get along without it ." In the industries which are favored by strong leadership, the problems of the smaller producers are being met by the simple expedient of following the "leader," or where conditions are favorable, the small producers are setting the pace themselves.

In the scramble for sanctuary from the law, the position of the small producers in the industries which have strong and intelligent leadership is almost ideal. They have nothing to fear; if the leaders should turn on them and begin to cut prices below costs the small producers could appeal to the Federal Trade Commission against "unfair" practices as evidenced by "cut-throat competition," and nobody can prevent them following the prices set by their stronger competitors, and nobody can keep them from getting the prices. It is true that a refusal to compete under such circumstances would result in a "restraint of trade" as it is now understood and in view of some recent decisions the Supreme Court might find it necessary, in the interest of that "public policy" which is so deeply impressed upon the official mind, to hold that an individual corporation working through its officers or agents (as in the Beechnut case) could be guilty of "conspiracy in restraint of trade." Or, since the court looks at the results in considering these cases, it might even go to the extent of erecting a constructive combination or conspiracy as between the "trade leaders" and the small producer.

These four lines of action represent the first reactions of industry to the pressure brought against new economic growths by the Hardwood decision. Unless the law is changed and the pressure removed, industry will either succeed in neutralizing the effects of the pressure, or will be stifled by it. The chances favor a successful neutralization of the pressure, or, in other words, the successful evasion of the law. The physical laws which operates the economic system under which we live are stronger than statute laws and rules and will continue to overcome restraints as long as they retain the virility which is their present day characteristic.

We do not share the pessimism which has grown up as a result of the refusal of the Senate to consider the Edge resolution calling for an inquiry into the economic state of the nation. We understand the pessimism, having come into contact with some of those who make the nation's laws during the course of a stay of several days in Washington,

but we believe that pessimism is premature.

Our optimism in the face of the apparent inability of Congress to consider any question relating to the industry on its merits arises out of conclusion from a survey on the ground, that Congress is not nearly so unintelligent as it is generally supposed to be, and that when individuals making up the bulk of the mass of Congressmen begin to hammer and beat the tom-toms on the occasion of business daring to venture into the open to demand consideration of problems which concern it and the entire country, they are attending strictly to business—their own business. The average politician, Congressman, prosecutor, or what-not, is a producer, a vote producer. This is not a new discovery, but we think that its importance in the solution of the problem of how to get Congress to use its intelligence in the interest of the country instead of in the individual interest of Congressmen is generally overlooked.

We are told, and under existing conditions we believe it is true, that it is a waste of time to go to Congress with arguments or demonstrations concerned with economic questions unless the proposal carries assurance that increased votes will result to the Congressman giving favorable consideration to it. But we do not feel that that is altogether the fault of the Congressmen. In the first place, the "working Congressman" is an exceedingly busy man; the non-working Congressman is of little importance, except, of course, when he begins to yawp about something and is able to get it into the papers. We found that most of the active Congressmen with whom we talked were old men in point of service, and discovered that except in connection with their "specialties," or on subjects which they had 'investigated" very recently, their ideas about things in general and business in particular dated back to about the time they entered Congress, and were largely in the form of dogma derived from the most orthordox of sources in economies, sociology, religion, and everything else except politics. They were all up to date in politics, that being their business and their accustomed field of labor and effort.

Congressmen are no different, nor any less efficient than the average in any other field of activity. They lack the time to keep up with all the "newfangled" ideas, economic, or other. Adam Smith is good enough for most of them, and they all cling to the price theories laid down by that estimable, but not generally correctly estimated man as the rock of hope. Congress believes, most of the Federal Trade Commission believes, and practically all official Washington believes that if they can just keep prices down, the problems of the country are solved. Millions of men may be out of work, the wheels of industry may be rusting in their places, the average man may not know where his next meal is coming from, but if prices stay down, or what is better, are currently going down, official Washington is happy.

All the theories about "stabilization" and such like "smoke-screens" are simply not considered. They know all about that they say. They have been through it. There are tons of printed matter covering all those questions, and nobody knows what is in it.

People and, particularly, Congressmen are simply just not interested in what is in all that printed matter. So why do it all over again. Or, we live under the "competitive system" and industry just must compete whether it wants to or not. And if it refuses to compete why we must go on making like it does anyway, because that is the kind of system we are working under, and if we should stop believing that ours is a competitive system everything would simply go to smash. There is no use investigating, they say, for if we found that we ought to do anything about it we couldn't do it.

Honestly holding such views as these, and being too busy to try to brush up on new questions, the average working Congressman simply makes the most of his opportunities to make a little political capital with the folks back home by shouting "thief and scoundrel" at those who have the temerity to confront him with a request for some consideration of a new state of affairs in the world, and for the problems of American industry in the effort it is making to improve the condition of all those engaged in it, and at the same time prepare itself for meeting the competition of organized industry in every other country under the sun.

Well, you say, where is there any basis for optimism in all that? Why, simply in this. The average Congressman is laboring under the impression that the folks back home and in the country at large are just as far behind the times as he is, and when he is disillusioned in that respect he will be just as active and intelligent as anybody could be in considering the problems before industry and agriculture.

The so-called farmers' co-operative law is purely an illusion, which will be dispelled the first time the "restraint of trade" question involved gets to the courts, and it will get there despite the theory advanced by Senator Cummins and others that the Government alone can move in the prosecution of such cases which means that the farmers will shortly be asking for more legislation.

XXIII

Action by Congress Demanded

In the face of undoubted improvement, various estimates of the number of unemployed in this country still range from 3,500,000 to 4,000,000. Unemployment is a recurring thing, a familiar phenomenon in our economy; it is not "due to the war," nor, in our opinion, is it an unavoidable, or "natural" phase of capitalistic enterprise.

Everybody now knows what "business cycles" are, and most everybody who speaks with any authority believes that they can be eliminated or modified. The advocates of business co-operation through trade associations claim that "stabilization" can be attained through the medium of these associations, that production can be carried on in an orderly manner free of the speculative factor which is at bottom responsible for "business cycles." The trades themselves have expressed their faith in organization as a method of "stabilization" by organizing over 500 associations which engage in stabilizing practices, and over 2,000 associations of various other co-operative forms.

The decision of the Supreme Court in the Hardwood case automatically forced every one of the "stabilizing" associations into the "twilight zone," tactical legal opinion to the contrary notwithstanding. Congress cannot evade the duty it owes the country of examining into the claims made by the advocates of business organization through denouncing Wall Street and imputing motives for which there is no basis outside of the fixed attitude of suspicion toward business which individual legislators maintain as a part of their vote-getting equipment. Politicians cannot go on fooling the people of the country with cheap trickery forever; they may fool themselves, but they aren't fooling the people, and Congress as a whole must accept the responsibility which belongs to it, or bring all Government into greater disrepute than ever. The condition of unemployment, the disruptive and destructive effects of "business cycles" are facts, and it is up to Congress to do something about it.

Trade associations may not in fact do what is claimed for them; the Sherman law may be everything that its upholders say it is, but the country wants to know the truth about the situation. It wants to know whether it is properly equipped for the trials that lie before it in meeting not only the organized selling of other countries, but the organized buying of other countries, which is the real problem of this country in its relations with the rest of the world. Tariffs will not help producers whose primary markets are situated abroad; only one thing will help them, and that is organization that will enable them to hold their goods for a price which will return a profit.

The economic weakness of this country lies in the facility which its foolish laws give foreigners in buying in its markets. The farmers have been led into the delusion that they have at last freed themselves from this disability, but they are wrong, the Volstead-Capper law is as impotent in this field as the Sherman law is in the prevention of monopoly.

The farmers have graciously been allowed to form co-operative associations, but they must not "restrain" trade. "Restraint of trade," be it known, according to the Supreme Court will be presumed if the activities of the farmers in their association "result" in increased prices and decreased production, not "undue" increases in prices but just increased prices, or decreased production. Increased prices are inevitable as a result of the activities of farmers' associations if they accomplish their purposes. Except on occasions, in war time, for example, the great majority of farmers habitually sell their products below costs, and if their associations are effective they will force a change in that particular, which means that for the time being at least prices will go higher. The right to decrease production when the condition of the markets demands it is a fundamental factor in stabilization; if the farmers are denied that right then their associations will have little value either for the farmers or for the country in general. "Stabilization" will result, if at all, from a reasonable adjustment of supply to demand.

Distinguished Senators tell us that no inquiry into the workings of the Sherman law is necessary, that they know all about the Sherman law in its relation to the economic welfare of the country, and are satisfied to rock along. Perhaps they are; all Senators have incomes of $7,500, and some have considerably greater incomes, but there are from 3,000,000 to 4,000,000 persons in this country who have no incomes at all, according to the unemployment statistics, and they cannot afford to rock along. These persons want stability of employment, three regular meals a day, and shelter, and they are not concerned very much about how they get it, so long as they do get it. They are not wedded to any outworn political doctrines, or pet theories as to what kind of a system it is we live under. They are certainly not committed to such

theories to the extent that they are willing to do without food and shelter to maintain them. Even less are they committed to theories which are denied by experience and by competent opinion, and only supported by those whose expressed views reveal that they have given them no thought for years; that these persons are merely clinging to concepts taken into their minds back in the dark ages of economic advance in this country.

Business, "Wall Street," has too long been the villain of the political tragedy which is slowly unfolding in this country. Business alone has advanced; has been the sole instrument of progress and improvement in the material welfare of the people. The time is coming, if it is not already here, when business will take the trouble to meet its traducers own their own ground Our only hope lies in the coming of that time, then we may expect a realization of the truth that these hundred million inhabitants of this country are not gathered here for the pleasure and interest of politicians, for political exploitation, but are here to better their material condition, and to co-operate with one another in the struggle with nature.

The capitalistic system of production is not a system of exploitation of the many by the few. It is a system which both in theory and in fact is capable of adjustment to the best interest of every man, woman and child who lives under it, and a realization of its fullest benefits is only being delayed by the politicians who for their own selfish ends in keeping themselves in office persist in misrepresenting and villifying those who happen to be in the position of leadership. The beneficent possibilities of the system are even only faintly appreciated by those who manage it. Most of those in positions of leadership and responsibility under the system believe that they are indeed the villains that the politicians make them out to be, and have not as yet dared to be bold in defense of the system or themselves. But recent study and investigation, largely in connection with the much maligned trade associations has waked them up to an appreciation of their real status, and they are slowly coming into the open to fight for the things which now appeal to them as being good for the general interest as well as for their own interest.

Most of the "working Congressmen," including Senators, labor under the same mistaken idea of the business leader that those leaders themselves have held so long, and are therefore not open to the charges of selfish exploitation of the masses through misrepresentation which we unhesitatingly make against the mere politicians. The majority of these legislators have been continuously engaged in, often, perhaps, misguided, labor in the public interest for more years than most of them like to count. Their economic and political ideas were taken in from the best source available at the time of their entry to public life, but they have never been let out, or changed, except perhaps in a few cases. As we have said, in this respect they are in no way different from the average man of equal intelligence and equipment in other walks of life. They are just as intelligent, and on the whole just as patriotic and unselfish as the average business man, but no more so. They are perhaps just as anxious to eliminate the evils incident to business cycles as anybody else, but the first effort to get them to move in that direction was checked by their prejudices and their suspicions. They are honestly convinced, in the main, that they know all about the motives and intentions of those who have suggested an investigation into the economic state of the nation, and when they are not convinced that some ulterior motive underlies the appeal for a little light on the situation they are convinced that anything that might be suggested would be in conflict with the "political foundations" of the nation, of which they, of course, are the sole guardians.

They do not believe that business is honestly at sea, that the disruption of trade associations following the Hardwood decision has resulted in any hardship. Most of the legislators believe that if the Hardwood decision had any effect at all on business organization it was in the direction of putting a stop to practices opposed to the general welfare. They do not believe that there is any community of interest between the business man and the public, between buyer and seller, and they are all for protecting the buyer, notwithstanding that it is from the buyer, the foreign buyer, that this country suffers most, particularly the farmer.

They accept the theory of the "struggle for existence" with all of its brutality. They do not understand that enlightened business men no longer accept that theory, that they are slowly but surely accepting the Christian doctrine of responsibility. And the strange thing about it all is that these men cling to their old ideas because they believe that it is by these ideas alone that the capitalistic system can be justified.

XXIV

Proposed Permanent Solutions

In our opinion, the trade associations should go before the country with the frank admission that their activities do and are intended to "restrict competition," not only of the "cut-throat" type, but of the ignorant type—one is just as bad as the other—but with the argument that they do not "restrain trade"; that they, in fact, increase trade, eliminate waste, and otherwise operate to the benefit of the public.

The Sherman law is directed at "restraint of trade" and not "restraint of competition." The Supreme Court has made restraint of competition the equivalent of restraint of trade. It is our contention, however, that these terms do not mean the same thing, either in fact or in the intent of the legislators, who incorporated the phrase "restraint of trade" in the law. In a very narrow and immediate sense, it is possible to make restraint of competition equivalent to restraint of trade, but in the long run the identity disappears, and the real question becomes that of the effect of restricted competition upon trade—whether restricted competition in fact results in a restraint of trade. This question must finally be decided in the light of the effect of restricted competition upon the volume of trade as it is only by a decrease in the volume of trade that restraint of trade can be shown.

The question of the effect of restricted competition on trade involves numerous factors which do not appear on the surface, among them the factor of waste in periods of over-production and the factor of want and unsatisfied demand in periods of under-production. Which is more conducive to unrestrained trade, a system which regulates supply to demand or a system which operates haphazardly, throwing unwanted goods on the market at one time and producing nothing at another?

As for ourselves, we favor a modification of the Sherman law by the introduction of some such qualifying clause as "detrimental to the public interest" in connection with "restraint of trade" section of the act. And, despite our belief that the Supreme Court has been unnecessarily and unprogressively narrow in its construction of the law as it stands, especially in relation to trade associations, we believe that the interpretation of the law should remain exclusively in the hands of the courts. We have several grounds for this preference. In the first place, we are forever and aye opposed to any further extension of the bureaucracy which is already threatening to overwhelm us, and do not want any more regulatory commissions than are absolutely necessary. Bureaucrats and commissioners inevitably lay their courses to please popular prejudices or clamor, or what is worse, they use their offices to create prejudices and stir up clamor. The courts may err, but if they do, they err through faulty judgment, and not through self-interest.

There are some strong objections to forcing the trade associations back on the courts for sanction, but they are not as weighty as the objections to more regulation. Years would perhaps elapse before the law became "settled" under a "detrimental to public interest" clause, but the practical disadvantages of this loss of time would not be as great as might be supposed—that is, of course, unless the courts took particular pains to immediately declare trade association activities to be detrimental to the public interest.

Such a result is hardly to be expected, however, notwithstanding a belief that some members of the present Supreme Court are perhaps permanently set against trade associations for the very reason that they believe that association activities are detrimental to the public interest.

All kinds of minds or schools of thought go to make up a court as well as a nation, and rules for interpretation differ with the differences in minds and schools. The letter of the law school takes a different line from the spirit of the law school, and the "public policy" schools differ as to what is "public policy." It is, nevertheless, probable that a change in the law modifying the restraint of trade section of the Sherman law by adding "detrimental to the public interest" would lead the courts to a reconsideration of the rule, which holds that restraint (restriction) of competition is the same thing as restraint of trade, since they would then be in a position to say that while restraint of competition was equivalent to restraint of trade, the restraint of competition resulting from trade association activities was not "detrimental to the public interest."

In other words, under the law as it stands, the question of the interchangeability of these two phrases is a question of the actual effect of restricted competition as a restraint upon trade, and the courts have apparently assumed that the facts are opposed to the contention that restriction of competition does not result in restraint of trade, while under the proposed modification the question would mainly turn on interpretation. In any case, either under the law as it stands

or under a modified law the question of the value of trade associations will never be settled until it is "settled right"; that is, in accordance with economic law.

The demand for a sanction of "plans" by some governmental body in advance of their being put into operation is based on a too literal acceptance of the complaint that under present conditions business does not know what it can or can not do. There is plenty of ground for such a complaint, but it has been established by the confusing counsels that have arisen as a result of the various suggestions for saving the good associations brought forth by the Hardwood decision. As a matter of plain fact, it is pretty well settled under the law as it stands that the law and the courts together are opposed to trade associations, and that the real complaint of business is that the law and the courts are interfering to restrain it from developing in accordance with the law of its being. Sound tactics, therefore, call for the abandonment of the "confused state of the law" position, and the consolidation of all forces behind the main line of attack, that is upon the point that trade associations are economically valuable and deserving of freedom from the restrictions of the Sherman law.

If anybody has a really sound reason for vesting the Trade Commission or any other quasi-judicial commission with the power to interpret the law in advance for the guidance of business so as to confer immunity, that step can be taken also, but not without a modification of the law, which would give the associations some standing in court in case they were forced to fall back on the courts in resisting the tyranny or bumptiousness of bureaucrats.

As we have said before, we are opposed to the commission plan on general principles, mainly on account of the fact that such governmental interference is opposed to our institutions, dangerous in precedent and unnecessary.

The tax burden is already too heavy and we see no reason for increasing it by adding a bureau, which, if it was effective at all, would have the power to modify the provisions of the Sherman law—a thing that can be done once and for all and with much greater satisfaction by Congress itself. Furthermore, the Trade Commission already has more power than is good for it, or the country. The salvation of business, of the country, and Government is in the last analysis dependent upon business itself, and not upon any commission now existing or yet to be created.

These conclusions as to a modification of the Sherman law have been reached after a wide study of the question in all its aspects, and represents our view of not only what is practical but of all that is desirable, or advisable. Business morals are developing very unevenly in this country, and we have not yet reached the stage at which it would be possible to throw off all restrictions, and rely upon all business to govern itself. But the way of wisdom in developing economic stability as well as a greater sense of responsibility within business lies in giving it the greatest possible scope for free development.

XXV

Secretary Hoover's Plan

It may be that Secretary Hoover's plan, outlined in his letter to the Attorney General, offers the only practical relief from the intolerable oppressions of a stupid law that is to be immediately expected, but the best Secretary Hoover can do under the restraints imposed upon him by the law will be little.

The difficulty is not with the plan proposed by the Secretary in his letter to the Attorney General, but with the law itself. Attorney General Daugherty obviously went as far in assuring the Secretary of Commerce against mere meddling interference as his authority permitted him to do. As we said at the beginning of this discussion, Mr. Daugherty's letter answering Mr. Hoover's specific question left the situation just in the same place that it found it.

As we said then, nobody is worried about the things that trade associations may do as long as they do nothing that violates the Sherman Law. The trade associations which do not violate the Sherman Law as it has been interpreted by the courts are not interested in the Hardwood decision or its affects. The associations affected are those which collect and distribute information concerning stocks on hand, production and sales, the things specifically prohibited by the decree in the Hardwood case. There are some five or six hundred of these associations and these are the associations which are economically valuable as "trade stabilizers." Numerous trade associations do not concern themselves with such matters at all, being engaged for the most part in work in fields which are not directly related to production and distribution. Practically every association interested in the production and distribution of goods engages in practices which are prohibited by the Hardwood decree, and is affected by it, whether it follows the "open price" plan or not.

Exchange of price information covering current transactions is not an absolute necessity in connection with the attainment of reasonable industrial stability. The vital information in this connection is information covering production, stocks on hand, and other information revealing the condition of trade and production, although knowledge of prices is necessary for the intelligent use of the other information. Price information supplied by one member of a trade to another is also a protection and a convenience; it protects the trade against the misrepresentation of buyers who seek advantage by falsely stating that a competitor of the seller has offered identical goods at a lower price, and it is convenient for the reason that it relieves association members of the trouble of individually collecting the same information by more expensive and time-wasting methods. There never was very much secrecy about competitors' prices even in the days when secrecy was considered as an essential element of intelligent business method. And nowadays there is none at all. With the aid of a telephone any trader can "get a line on the market" by calling a few numbers, and giving the time that is required for such an inquiry.—Or by reading the newspapers which cover the business field.

The objection to laws and regulations which undertake to control business is not so much that they are not well-intentioned, but that they are futile and result in an unnecessary and wasteful increase in the expense of doing business, and, therefore, tend to raise prices.

No law that ever was passed or regulations devised could prevent men doing a thing they were bent on doing. If, for example, those engaged in a given trade were determined to charge a uniform price for their product nothing could prevent them from following the prices made by one of their number, in whose judgment they had confidence. "Price fixers" do not take the trouble to operate an elaborate system for the collection and distribution of information about the state of trade; they simply fix prices arbitrarily.

Aside from the question of the future attitude of the Department of Justice in the event Secretary Hoover's plan "results" in a violation of the law as laid down in the Hardwood case, the practical question confronting the Secretary of Commerce is that of devising a method of collecting and distributing information that will be currently valuable and of a character sufficiently reliable to justify cautious business men in acting upon it. The problem of collecting and distributing the information in time to make it of value in current business can, perhaps, be solved more easily than the problem of insuring its reliability.

All business men are not honest, even when they are members of trade associations, and a good deal of the trade association machinery which has aroused the suspicions of the courts and prosecutors is employed in keeping members in line and seeing to it that they give a fair exchange of information for what they get. The men who are in the associations and, therefore, know the "tricks of the trade," frequently have difficulty in keeping all members up to the mark of fair dealing, and there is

serious reason to doubt the claim that a system of reporting to a government department, which is without the authority to audit and investigate reliability, can be made valuable to all the trades it undertakes to cover.

Reasonable success is, nevertheless, to be expected, even in this particular, from the trades in which natural conditions are more or less favorable. But to the extent that the operations of Mr. Hoover's plan fall short of what a trade association, free to operate in a natural manner, could accomplish for itself, the plan will work unevenly and result in disadvantages to those trades which cannot be controlled.

Nothing is to be gained by glossing over the facts in the situation, nor by lulling business men into a false sense of security. Tame submission to an intolerable condition may result in the loss of an opportunity to force reforms such as is not likely to present itself again in the near future. The trouble with most of those who have interested themselves in the problem, is that they appear incapable of freeing themselves from the idea that once a law is put on the statute books, or the popular mind gets wrapped around a notion that its interest lies in the maintenance of the status quo, it is useless to struggle. Others ignorant of the fundamentals of economy accept the popular view that the law serves a desirable social end, and confuse the issue by parading their delusions in the dress of sound public policy. These are the ways of degeneration and retrogression; so far as we are concerned we are committed to the view that we cannot have progress unless we have sanity, and are not disposed to compromise until we are shown something that is worth it.

XXVI

"Publicity"—The Way Out

In bringing our discussion of the Sherman law in its relation to modern business development to a close we desire to emphasize two lines of action for trade associations which, in our opinion, and also in the opinion of more competent authorities, offer them the maximum security attainable under existing conditions.

The most important of these two lines of action is directed toward a modification of the Sherman law through the incorporation of the clause "detrimental to the public interest" in the "restraint of trade" section of the act, in accordance with the suggestions already made.

In the event the effort to obtain a modification of the Sherman law fails, the best thing the trade associations can then do in our opinion will be to fall back on Secretary Hoover's "publicity plan," either in co-operation with the Government or by taking up the plan along independent lines. Mr. Hoover has said that he will not co-operate with "open price associations" in collecting, compiling and disseminating trade statistics and information, but that need not stop the open price associations from following the same line of policy independently and through other mediums of publicity.

We believe that with full publicity the analogy between trade association practices and exchange practices would be so complete that no effort would ever be made to prosecute the associations under the Sherman law. The associations have all along insisted that the analogy already exists, but the Supreme Court in denying the analogy in the Hardwood decision pointed to the very important difference that buyers get the information collected and disseminated by the exchanges at the same time and in the same manner that it is made available to sellers.

The stock exchanges which operate exclusively on the "open price plan," collect and disseminate their own information, or have it collected and disseminated for them by individuals and pub'ications interested in the trading, or catering to traders without the sanction of Governmental authority, and without interference by law officers engaged in enforcing the Sherman law.

It is generally recognized that as practiced on the stock exchanges, the exchange of information concerning prices and other data can not result in a restraint of trade. As a matter of fact the publication of this information makes the market and increases trade, for it is obvious that a trader will have more confidence in a price made by hundreds of buyers and sellers in a free and open market than he would have in a single or even a dozen private quotations. The same principles govern in the trading in ohter markets operated on the "open price plan" whether they deal with hosiery or Government bonds.

Stock exchange prices are not "fixed prices," or even uniform prices; the method of trading tends to the stabilization of prices under equal conditions, but does not even have that effect when conditions are changing. In the matter of fluctuations there is naturally a great difference between a stock exchange and a market in which the speculative factor has been eliminated or greatly modified. Trade associations whose activities are directed toward balancing supply and demand have the elimination of the speculative element as a principal objective.

If open price association transactions were reported on a ticker in the same manner as transactions on the stock exchanges are reported, it would immediately become obvious to everybody that there is very little difference in the actual operation of the two types of market. The member of a trade association sells a commodity and reports the price to the secretary of his association; a member of the stock exchange sells a block of securities and reports the price (unofficially) to the secretary of the exchange. The only difference is that the stock exchange trader at the same time reports the price to the ticker service and the ticker service reports it to the world, thus almost immediately giving every trader, buyer and seller, interested in that particular security all the information with respect to the price that the market affords. All of the sellers of a particular security during a day do not get the same price, any more that all the sellers of hosiery get the same price, but the sellers of securities and the public are immediately advised of the price the other sellers got, and that is all that happens in connection with an "open price" transaction of any sort, and is obviously unassailable because it is a method for sane and intelligent trading.

Tranactions in grain and cotton are carried out and reported in about the same way. There has never been any serious suggestion that the Government take over and operate the stock exchanges—there are obvious reasons why no such silly suggestion has ever been made—but if the Secretary of Agriculture followed the same line of policy that Secretary Hoover has adopted he would refuse to collect and distribute production and stock statistics in

the cotton and grain trade because the traders in cotton and grain engage in "open price" activities. There is of course a difference in the degree of co-operation between the plan outlined by Secretary Hoover and that pursued in connection with the cotton and grain trades, but the principle is once more the same. However, we do not believe in logic ourselves, and do not criticise those who do not follow it. Still we do not see why production statistics should not be collected and published in all fields where practicable, regardless of the other activities of those engaged in any particular industry.

We understand the physical difficulties which would confront any attempt by Governmental bureaus to collect and distribute all the information now collected and distributed by "open price associations." Understanding these difficulties, we are disinclined to accept Mr. Samuel Untermyer's assumption that he forced Secretary Hoover to abandon the "open price associations." Mr. Hoover has said that he does not and never has approved the open price plan or that is the implication of what he has said with respect to these associations, and while we disagree with his position we believe him when he says that that is the basis of his refusal to co-operate. It is nevertheless apparent after an investigation that Mr. Hoover could not have worked out a practicable plan of co-operation with these associations along the lines he has laid down for the other associations, even if he had wanted to. That being so, the open price associations have no grievance against Mr. Hoover, as he could not have helped them, anyway.

The Commercial has undertaken an investigation of the question of the practicability of publishing "open price" transactions in some of the markets, but has reached no conclusion as to what can be done. We have found that some trades object to "publicity" and are disinclined even to go into the question. We believe this to be a mistaken and untenable position, since the associations cannot expect to establish themselves in public confidence until they reach the point at which they are willing to establish "open markets and open prices" in fact as well as in name.

If any sort of a regulatory bill comes out of the movement for legislation on the subject of trade associations, publicity will be a necessary and inevitable feature. But we can see no necessity for regulation, as we believe that with full and concurrent publcity the trade associations can do even more than they would perhaps be permitted to do under a licensing plan.

In connection with our investigation into the practicability of publishing "open prices" in The Commercial, we invite suggestions from trade association secretaries and others in the trades who do not object to publicity. The difficulties in the way of carrying out such a plan are numerous and some are perhaps insurmountable, but we believe that a workable plan can be devised in at least some of the larger trades. Such a plan would of course depend on the co-operation of the associations, as without the associations no data of value could be collected. This newspaper has been engaged in the publication of "prices" for close to 130 years and has no present intention of discontinuing the service.


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